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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 229.

GEORGE F. ALBRIGHT, APPELLANT,

vs.

THE TERRITORY OF NEW MEXICO *EX REL.* JESUS M. SANDOVAL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED APRIL 17, 1905.

(19,712.)

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1 Be it remembered, that heretofore, on to-wit *on* the 23rd day of December, A. D. 1905, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, a transcript of record, in a certain cause therein pending entitled George F. Albright, plaintiff in error, *vs.* The Territory of New Mexico *ex rel.* Jesus Ma. Sandoval, defendant in error, and numbered, 1064 in the docket of the said court, which said transcript of record, is in words and figures following, to wit:—

2 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS M. Sandoval, Defendants in Error, *vs.* GEORGE F. ALBRIGHT, Plaintiff in Error.	No.—. Writ of Error to the District Court, Bernalillo County.

Transcript of Record and Proceedings in Case No. 6395.

Be it remembered that heretofore, on to-wit, the 21st day of November, 1904, there was filed for record in the office of the clerk of the district court a writ of error issued out of the supreme court of the Territory of New Mexico in the case of The Territory of New Mexico *ex rel.* Jesus M. Sandoval, defendant in error, *vs.* George F. Albright, plaintiff in error, commanding the clerk of the second judicial district court to certify the record and proceedings in a case lately therein pending, entitled: "Territory of New Mexico *ex*
3 *rel.* Jesus M. Sandoval, plaintiff, *vs.* George F. Albright, defendant, which said writ of error is in words and figures following to-wit:

Territory of New Mexico to the district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, Greeting:

Because in the record and proceedings, and in the rendition of judgment, in a certain cause lately pending before you, wherein The Territory of New Mexico *ex rel.* Jesus M. Sandoval was plaintiff, and George F. Albright was defendant, error has intervened as it is said, to the damage of the said George F. Albright, defendant, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid, to the supreme court of the Territory of New Mexico, together with this writ, so that you have the same in the said supreme court on

the first day of the next term thereof, to be begun and held on the first Wednesday after the first Monday in January. A. D. 1905, at Santa Fe, in said Territory, in pursuance of law.

Witness, the Honorable William J. Mills, chief justice of the supreme court of the Territory of New Mexico, and the seal of the said court, this 19th day of November, A. D. 1904.

JOSE D. SENA, Clerk.

(Endorsed: Filed in my office the 21st day of November, 1904. W. E. Dame, clerk.)

4 Be it remembered that heretofore; on to-wit, the 20th day of July, 1903, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, a motion for rule in a certain cause entitled The Territory of New Mexico on the relation of Jesus Maria Sandoval, *versus* George F. Albright, which said motion is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo County District Court, March Term, A. D. 1903.

THE TERRITORY OF NEW MEXICO on the Relation of JESUS MA. Sandoval
vs.
GEORGE F. ALBRIGHT.

Motion for Rule.

Now comes Edward L. Bartlett, solicitor general of the Territory of New Mexico on behalf of the people thereof and files the affidavit of Jesus Ma. Sandoval and moves the court for a rule to be made on George F. Albright of Bernalillo county aforesaid, to show cause if any he has, why he, the solicitor general, should not have leave to file the information in the nature of a *quo warranto* in this court, on behalf of the people of the Territory of New Mexico on the relation of Jesus Ma. Sandoval against said George F. Albright for having unlawfully usurped and intruded into and for unlawfully executing and holding and performing the duties of the office of assessor of Bernalillo county, New Mexico.

EDWARD L. BARTLETT,
Solicitor General of the Territory of New Mexico

(Endorsed, filed in my office this July 20th, 1903. W. E. Dame, clerk.)

5 And thereafter, to wit, on the 20th day of July, 1903, there was filed in the office of the clerk of said court in said cause the affidavit of Jesus M. Sandoval, which said affidavit is in words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

Jesus Ma. Sandoval, of lawful age, being first duly sworn on his oath, deposes and says, that at the general election held in the Territory of New Mexico on the 4th day of November, 1902, he was duly elected to the office of assessor of Bernalillo county for the term of two years from the 1st day of January 1903, and until his successor is duly elected and qualified; that he received from the proper officers of Bernalillo county a certificate of said election and thereafter and within the time prescribed by law he duly qualified as such assessor by taking the oath and executing the bond prescribed by law and entered upon the discharge of the duties of said office and ever since has been and still is the only person lawfully authorized to discharge the duties and to enjoy the emoluments and privileges appertaining to said office; that he has never resigned the said office, nor has the same been abolished, nor has he been removed therefrom by any competent authority, and the term for which he was elected will not expire until the 1st day of January, 1905. That the fees and emoluments of said office are of great value, to-wit, of the value of six thousand dollars per annum, and aff-ant has a vested interest in said fees and emoluments of which he can not be lawfully deprived without due process of law, and that said office has not been at any time since affiant entered upon the discharge of the duties thereof, vacant or without an incumbent competent and qualified to discharge the duties and transact the public business appertaining thereto.

6 Affiant further states that the board of county commissioners of Bernalillo county pretending to act as affiant is informed under the authority of the provisions of an act of the legislative assembly of the Territory of New Mexico, entitled "An act to create the county of Sandoval," approved March 10th, 1903, as the same was amended by an act entitled "An act to amend section 3 of an act entitled an act to create the county of Sandoval," approved March 12th, 1903, did on the 27th day of March, 1903, attempt and pretended to appoint one George F. Albright to be assessor of the county of Bernalillo aforesaid for the portion of the term of this affiant which had not and has not expired, and on the same day the said George F. Albright by stealth and fraud, claiming to act under said pretended appointment, unlawfully took possession of the room in the court house of said county assigned to the use of the assessor, and also took possession of the books, papers and other insignia of the said office, and has ever since claimed and assumed to be the assessor of said county and usurps the said office and excludes this affiant therefrom, and unlawfully receives and appropriates to the exclusion of this affiant the fees and emoluments of said office, as aforesaid.

Affiant alleges that the said legislation, in so far as it attempts to deprive this affiant of his rights in said office and to authorize the

selection or appointment of any other person to be assessor of Bernalillo county for the unexpired term for which this affiant was elected, is void because it is in contravention of the provisions of the Constitution of the United States and of the legislation of Congress, and affiant prays that there may be a judicial inquiry as to the title of this affiant and of the said George F. Albright to the said office of assessor of Bernalillo county.

JESUS M. SANDOVAL.

7 Subscribed and sworn to before me by Jesus Ma. Sandoval this 20th day of July, 1903.

[NOTARIAL SEAL.] FRANK ACKERMAN,
Notary Public, Bernalillo County.

(Endorsed, filed in my office this July 20th, 1903. W. E. Dame, clerk.)

And thereafter, on to-wit, the 20th day of July, 1903, there was entered of record in the office of the clerk of the said court, in said cause, an order, which said order is in words and figures following, to-wit:

On reading and filing the affidavit of Jesus Maria Sandoval, and the motion of the solicitor general founded thereon, it is ordered that George F. Albright show cause before this court on Tuesday the 21st day of July, 1903, at 10 o'clock a. m., why the said solicitor general shall not have leave to file an information in the nature of *quo warranto* against him for usurping the office of assessor of Bernalillo county.

Service of a copy of this order to be made on George F. Albright during this 20th day of July, 1903, by any disinterested person.

B. S. BAKER, Judge.

I, George F. Albright, hereby acknowledge service this 20th day of July, 1903.

GEO. F. ALBRIGHT.

(Endorsed, filed in my office this July 20th, 1903. W. E. Dame, clerk.)

And thereafter, on to-wit, the 21st day of July, 1903, there was entered of record in the office of the clerk of said court, in said cause, an order granting leave to file information, etc., which said order is in words and figures following, to-wit:

8 TERRITORY OF NEW MEXICO on the Relation of JESUS Maria Sandoval
vs.
GEORGE F. ALBRIGHT.

This cause coming on to be heard upon the motion of the solicitor general, to show cause, the court, upon consideration, grants the

same; and leave is hereby given to file an information in the nature of a *quo warranto*.

It is ordered by the court that the defendant, George F. Albright, be and he hereby is ordered to make answer on Thursday at 9:30 a. m., July 23rd, 1903.

The defendant being present in court in person, and by counsel, waives service of copy of information.

And thereafter, on to-wit, the 21st day of July, 1903, there was filed in the office of the clerk of said court, in said cause, an information, which said information is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo County District Court, March Term, A. D. 1903.

TERRITORY OF NEW MEXICO on the Relation of JESUS MA. SANDOVAL
vs.
GEORGE F. ALBRIGHT.

Information.

Edward L. Bartlett, solicitor general for the Territory of New Mexico, who prosecutes for and on behalf of the people of the Territory of New Mexico on the relation of Jesus Ma. Sandoval of the county of Bernalillo aforesaid, comes here in the court and gives the court to understand and be informed, that at the general
9 election held in the Territory of New Mexico on the 4th day of November, 1902, Jesus Ma. Sandoval was duly elected to the office of assessor of the county of Bernalillo aforesaid, and received from the proper officers of said county a certificate of his election to the said office; that thereafter and within the time prescribed by law the said Jesus Ma. Sandoval duly qualified and entered upon the discharge of the duties of the said office of assessor aforesaid, and has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office; that the said Jesus Ma. Sandoval has never resigned from nor vacated his said office, nor has the term for which he was elected expired, nor has the said office become vacant, nor has it been without a lawful incumbent at any time since the said Jesus Ma. Sandoval qualified and entered upon the discharge of the duties of said office. Nevertheless one George F. Albright on the 23rd day of March, 1903, and while the said Jesus Ma. Sandoval was in possession of said office and engaged in the discharge of the duties thereof, by stealth and fraud and without authority of law did unlawfully usurp the said office of assessor of Bernalillo county and did take possession of the room assigned for the use of the assessor of Bernalillo county in the court house of

said county, and of the books, papers and other insignia of said office, and has ever since assumed to be assessor of Bernalillo county aforesaid, and by such unlawful usurpation and intrusion has become possessed of the said office of assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Territory of New Mexico.

II.

And the said solicitor general on the relation of said Jesus
10 Ma. Sandoval, further gives the court here to understand and be informed that on the 23rd day of March, 1903, George F. Albright unlawfully took possession of and held and still does unlawfully hold the office of assessor of Bernalillo county, and claims to hold the same and to be the lawful incumbent of said office by virtue of a pretended appointment thereto by the board of county commissioners of Bernalillo county which was pretended to be made by authority of an act of the legislative assembly of the Territory of New Mexico, entitled "An act to create the county of Sandoval," approved March 10th, 1903, as amended by an act entitled "An act to amend section 3 of an act entitled 'An act to create the county of Sandoval,'" approved March 12th, 1903.

Which said legislation was and is void in law and of no effect in so far as it attempted or pretended to authorize or empower the selection or appointment of any other person than the said Jesus Ma. Sandoval to be assessor of the county of Bernalillo aforesaid for the term for which the said Jesus Ma. Sandoval had been theretofore elected by the qualified electors of Bernalillo county as in the first count thereof set forth, in that the said legislation attempts to deprive the said Jesus Ma. Sandavol of his right to said office for the full term for which he was elected without due process of law and deprives the said Jesus Ma. Sandoval of the equal protection of the laws and is therefore in contravention of the provisions of the Constitution of the United States, and in that the said legislation is a special law regulating county affairs and granting special privileges to the board of county commissioners of Bernalillo county and is in contravention of the legislation of Congress and is not within the grant of legislative power granted by Congress to the Territorial legislature, in that the same is not, so far as it attempts
11 to deprive the said Jesus Ma. Sandoval of the office of assessor of Bernalillo county for a portion of the term for which he was elected, a rightful subject of legislation by the said Territorial legislature, and the said George F. Albright therefore holds the said office and assumes to discharge the duties thereof wrongfully, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the Territory of New Mexico.

EDWARD L. BARTLETT,
Solicitor General for the Territory of New Mexico.

(Endorsed, filed in my office this July 21st, 1903. W. E. Dame, clerk.)

And thereafter, on to-wit, the 23rd day of July, 1903, there was filed in the office of the clerk of said court, in said cause, a demurrer to the information, which said demurrer was in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS MARIA SANDOVAL }
vs. }
GEORGE F. ALBRIGHT. }

Demurrer.

Now comes the respondent, George F. Albright, by W. B. Childers, his attorney, and demurs to the information filed in the above entitled cause, and for ground of demurrer alleges:

1. That the said information does not state facts sufficient in law on which to base the writ issued in said cause.

2. Because it affirmatively appears in and by said information that the respondent holds said office of assessor of the county of Bernalillo under and by virtue of an appointment by the board of county commissioners of Bernalillo county, made under and by virtue of the authority in them vested by section 3 of an act entitled "An act to amend section 3 of an act entitled 'An act to create the county of Sandoval,' approved March 10, 1903," approved March 12, 1903, of the thirty-fifth legislative assembly of the Territory of New Mexico.

3. Because the relator has no vested right, title and interest and had no right, title and interest in and to said office of assessor, and the said office was under the power and control of the legislative assembly of the Territory of New Mexico.

4. Because in appointing the respondent assessor of the county of Bernalillo the board of county commissioners acted in due conformity and in all respects with law and under and by virtue of the act of the legislative assembly set up in said information and above set forth.

5. Because the said act is not in contravention of the provisions of the Constitution of the United States, and is valid and constitutional in all respects.

6. Because the said information does not state facts sufficient to entitle the relator to the relief prayed for.

Wherefore, respondent prays that the said information may be dismissed and the said writ quashed.

W. B. CHILDERS,
Attorney for Respondent.

(Endorsed, filed in my office this July 28th, 1903. W. E. Dame, clerk.)

And thereafter, on to-wit, the 23rd day of July, 1903, there
13 was filed in the office of the clerk of said court, in said cause, the answer of respondent, which said answer is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

TERRITORY *ex Rel.* JESUS MARIA SANDOVAL, Relator, }
vs. }
GEORGE F. ALBRIGHT, Respondent. }

Answer.

Now comes George F. Albright, respondent in the above entitled cause, and for answer to the information filed against him, says:

1. That he admits that at the general election held in the Territory of New Mexico on the fourth day of November, A. D. 1902, Jesus Maria Sandoval was duly elected to the office of assessor of the county of Bernalillo and received from the proper officers of said county a certificate of his election to said office; that thereafter and within the time prescribed by law, the said Jesus Maria Sandoval duly qualified and entered upon the discharge of the duties of said office of assessor as aforesaid; but respondent denies that the said Jesus Maria Sandoval has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office and denies that the said Jesus Maria Sandoval is at the present time so qualified or has been so qualified since the tenth day of March, A. D. 1903.

2. Further answering the respondent says that he has no information as to whether or not the said Jesus Maria Sandoval has resigned his said office, but he denies that the said office did not become vacant and was not vacated by the said Jesus Maria Sandoval. Respondent admits that the term for which the the said Jesus Maria
Sandoval was elected has not expired, that is to say, this re-
14 spondent alleges that the said Jesus Maria Sandoval was elected to fill the office of assessor of the county of Bernalillo for the term beginning the first day of January, A. D. 1903, and the said term being for two years from that date, but this respondent alleges that the said office became vacant on the tenth day of March, A. D. 1903, in the manner hereinafter alleged.

3. This respondent further answering alleges that on the 23rd day of March, 1903, this respondent was lawfully appointed to said office as hereinafter alleged, and further alleges that the said office was vacant at the time he was so lawfully appointed, and denies that the said Jesus Maria Sandoval was in possession of the said office, engaged in the discharge of the duties thereof, and further answering, denies that by stealth and fraud and without authority of law did unlawfully usurp the said office and did unlawfully take possession of the room assigned for the use of the assessor of Bernalillo county in the court house of said county, and the books, papers and other insignia of said office. Respondent alleges that after having been duly appointed and qualified as assessor by filing his bond and oath of office as required by law, on the day aforesaid, he demanded possession of the office and said books and papers from one Jesus Garcia, who was then in possession of the same, and the said Jesus Garcia, who had formerly been a deputy under the said Jesus Maria Sandoval, peacefully delivered possession of the said room and said books, papers and other insignia of the office to this respondent.

4. Further answering, this respondent admits that he has ever since assumed to be the assessor of Bernalillo county and alleges he is the lawful assessor of said county, and denies that by any unlawful usurpation and intrusion he has become possessed of the said office of assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form
15 of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico, as alleged in said information, and alleges that he is the lawful incumbent thereof and entitled to the emoluments, immunities and privileges appertaining and belonging to the same.

5. For answer to the second cause of action is said information alleged, this respondent says that on the 23rd day of March, 1903, he, the said George F. Albright, was duly appointed assessor of the county of Bernalillo, and duly qualified as such aforesaid by filing his bond and oath of office, by the board of county commissioners of Bernalillo county, acting under and by virtue of section 3 of an act of the legislative assembly of the Territory of New Mexico entitled "An act to create the county of Sandoval, approved March 10, 1903," and as amended by an act entitled, "An act to amend section 3 of an act entitled "An act to create the county of Sandoval," approved March 12th, 1903; and this respondent, further answering, denies that the said legislation was and is void in law and of no effect in so far as it attempted or pretended to authorize or empower the selection or appointment of any other person other than the said Jesus Maria Sandoval to be assessor of the county of Bernalillo aforesaid for the unexpired part of the term for which the said Jesus Maria Sandoval had been theretofore elected by the qualified electors of Bernalillo county as in the first count of said information set forth; and denies that the said act in said particulars is void in law because the said legislation attempts to deprive the said

Jesus Maria Sandoval of his right to said office for the full term for which he was elected without due process of law and to deprive the said Jesus Maria Sandoval of the equal protection of law and is therefore in controvention of the provisions of the Constitution of the United States and in that the
16 said legislation is a special law regulating county affairs and granting special privileges to the board of county commissioners of Bernalillo county and is in contravention of the legislation of Congress and not within the grant of legislative power granted by Congress to the Territorial legislature in that the same is not in so far as it attempts to deprive the said Jesus Maria Sandoval of the office of assessor of Bernalillo county for a portion of the term for which he was elected a rightful subject of legislation by said Territorial legislature, but respondent alleges that the said legislation is valid in every particular and fully authorized and empowered the county commissioners to appoint this respondent to said office.

6. Further answering this respondent alleges that the office of assessor of the county of Bernalillo became and was vacant by reason of said legislation and creation of the county of Sandoval, it having been previously a part of the county of Bernalillo; said legislation being for the purpose of dividing the county of Bernalillo, and creating the county of Sandoval, that the legislature had full power and authority to pass said acts and every part thereof, and thereby vest in the county commissioners of Bernalillo county the power to appoint this respondent, or such other person as they saw fit to select, to the office of assessor for the new county of Bernalillo, as the same existed from and after the date of the passage of said acts. Respondent further alleges that the office was subject to the control of the legislature and that a vacancy thereafter was created by said acts above referred to.

7. Further answering, this respondent alleges that by virtue of an act entitled "An act to create the county of Sandoval," approved March 10, 1903, there was created the county of Sandoval
17 in the Territory of New Mexico, and that the said relator at the time of the creation of said county of Sandoval was and had been for a long time and many years previous thereto, a resident of the portion of Bernalillo county which was incorporated into and made the county of Sandoval, and that by virtue of the passage of said act creating the county of Sandoval, the said relator became and was and still is a resident of the said county of Sandoval and not of the county of Bernalillo, and thereupon the said relator ceased to be upon the passage of said act a resident of the said county of Bernalillo and was disqualified from exercising the duties of the office of assessor of the said county of Bernalillo to which he had theretofore been elected, and at the time of the appointment and qualification of this respondent as such assessor, by virtue of his appointment by the board of county commissioners under and by virtue of the act of the legislative assembly of the Territory of New Mexico, entitled, "An act to amend an act entitled 'An act to create the county of

Sandoval,' approved March 10, 1903, approved March 12, 1903, as alleged in the information in this cause, such office was and had been since the date of the creation of the said county of Sandoval, vacant; and the said respondent denies that he holds the said office and assumes to discharge the duties thereof wrongfully and contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico.

W. B. CHILDERS,
Attorney for Respondent.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

George F. Albright, being duly sworn, on oath, deposes and says that he is the respondent in the above entitled cause, that he
18 has read the foregoing answer and knows the contents thereof, and that the matters and things therein contained are true.

GEO. F. ALBRIGHT.

Subscribed and sworn to before me this 24th day of July, A. D. 1903.

[NOTARIAL SEAL.] E. L. MEDLER,
Notary Public.

(Endorsed: Filed in my office this July 23rd, 1903. W. E. Dame, clerk.)

And thereafter, on to-wit, the 24th day of July, 1903, there was filed in the office of the clerk of said court, in said cause, a demurrer to the answer of respondent, which said demurrer is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

TERRITORY *ex Rel.* JESUS M. SANDOVAL }
vs. }
GEORGE F. ALBRIGHT. }

Comes now the solicitor general and says that the said answer of the said respondent is not sufficient in law to establish the title of said respondent to the office of assessor of Bernalillo county and shows to the court the following causes of demurrer to the said answer, towit:

I.

Because the division of the territory of the county of Bernalillo did not take place under the acts of the legislature relied — and said act did not become operative as to such division until April 14th, 1903.

II.

Because on the 23rd day of March, 1903, the relator was a resident of the county of Bernalillo and the county of Sandoval had no territorial existence until April 14th, 1903.

19 III.

Because the legislature could not create a vacancy in the relator's office because of his non-residence of the county of Bernalillo when he was both as a matter of law and fact a resident of the county of Bernalillo as appears by the allegations of said answer certainly until April 14, 1903.

IV.

Because the allegations of said answer affirmatively show that the relator and not the respondent is entitled to said office.

V.

Because the respondent George F. Albright was and is ineligible to the said office if it is a new office as alleged in said answer, as this court will take judicial notice of the fact that he is a member of the legislative council which passed said acts and as such is incompetent to hold any office created by said council.

VI.

Because the said answer does not state facts showing that respondent is entitled to said office and is otherwise insufficient to constitute a defense to this action.

Wherefore, etc.

E. L. BARTLETT,
Solicitor General.

(Endorsed: Filed in my office this July 24th, 1903. W. E. Dame, clerk.)

And thereafter, on — -wit, the 24th day of July, 1903, there was entered of record in the office of the clerk of said court, in said cause, an order granting leave to strike out certain parts of answer, which said order is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO *ex Rel.* JESUS MARIA SANDOVAL }
vs. }
GEORGE F. ALBRIGHT. }

20 On motion, the defendant is hereby given leave to strike from his answer the following words, " in effect a new office " to which the plaintiff duly excepts.

Thereupon the cause came on for hearing by the court, and upon the completion of argument by counsel, the court takes the matter under advisement.

And thereafter, on to-wit, the 3rd day of August, 1903, there was entered of record in the office of the clerk of said court, in said cause, an order overruling the demurrer to answer, which said order is in words and figures following, to-wit:

TERRITORY OF NEW MEXICO *ex Rel.* JESUS M. SANDOVAL
vs.
GEORGE F. ALBRIGHT.

This cause coming on to be heard upon the information, and the answer of the respondent and the demurrer filed thereto, the court having heard counsel for the respective parties, Neill B. Field appearing for the Territory and W. B. Childers appearing for the respondent, and being fully advised in the premises the said demurrer is overruled; and whereupon the Territory and the relator announce that they will not plead further, it is ordered by the court, the demurrer admitting the truth of the allegations contained in the answer, *and* that the Territory and relator take nothing by their writ, and that he said respondent be and he is entitled to hold the office of assessor of Bernalillo county, and that the said writ be dismissed and that the respondent have and recover his costs in this behalf expended, to be taxed, and that execution issue therefor.

(Endorsed: Filed in my office this August 3rd, 1903. W. E. Dame, clerk.)

21 And thereafter, on to-wit, the 19th day of October, 1904, there was filed in the office of the clerk of the district court a mandate from the supreme court of the Territory of New Mexico, which said mandate is in words and figures as follows:

Territory of New Mexico to the district court sitting within and for the county of Bernalillo, in the second judicial district, Greeting:

Whereas, in a certain cause lately pending before you, wherein The Territory of New Mexico, *ex rel.* Jesus Ma. Sandoval was plaintiff and George F. Albright was defendant, by your consideration in that behalf, judgment was entered against the said plaintiff; and

Whereas, the said cause and judgment were afterwards brought into our supreme court for review by appeal, whereupon such proceedings were had in said supreme court that at the January, 1904 term thereof, on the twenty-fourth day of said term, the same being September 13th, 1904, it was considered that the judgment aforesaid, by you in form given, be reversed, and that the said cause be remanded to you with directions to re-instate this cause and pro-

ceed in accordance with the views expressed in the opinion of th court on file.

Now, therefore, you are hereby commanded to re-instate said caus upon your docket and proceed in accordance with the views ex pressed in the opinion of the court on file.

Witness, the Honorable Williams J. Mills, chief justice of the su preme court of the Territory of New Mexico, and the seal of said court, this 17th day of October, 1904.

JOSE D. SENA, Clerk.

(Endorsed: Filed in my office this October 19, 1904. W. E Dame, clerk.)

22 And thereafter, on to-wit, the 25th day of October, there was entered of record in said cause an order re-instating the same upon the docket of the second judicial district court for Bernalillo county, which said order is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo.

In the District Court.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS MARIA SANDOVAL
vs.
GEORGE F. ALBRIGHT. } No. 6395.

Now on this 24th day of October, 1904, this cause came on to be heard; N. B. Field appearing for Jesus Maria Sandoval, the relator; E. L. Medler for the respondent, George F. Albright. The relator moved the court to enter final judgment of ouster in said cause and for costs against the respondent; which motion was overruled. Relator excepts.

Thereupon the court ordered that this cause be reinstated on the docket and that the judgment hereinbefore entered in favor of the respondent Albright be, and the same is, hereby vacated, set aside, and held for naught.

It is further ordered that the demurrer of the relator to the answer of the respondent is hereby sustained; to which the respondent excepts. Respondent Albright given leave to file an amended answer on or before the 5th day of November, 1904.

(Signed) B. S. BAKER, Judge.

And thereafter, on to-wit, the 5th day of November, 1904, there was filed in the office of the clerk of said court an amended answer; which said amended answer is in words and figures as follows, to-wit:

23 TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

TERRITORY *ex Rel.* JESUS MARIA SANDOVAL, Relator, }
vs. }
GEORGE F. ALBRIGHT, Respondent. }

Amended Answer.

Now comes George F. Albright, respondent in the above entitled cause, and by leave of the court, files herein his amended answer to the information filed against him, and says:

1. That he admits that at the general election held in the Territory of New Mexico on the fourth day of November, A. D. 1902, Jesus Maria Sandoval was duly elected to the office of assessor of the county of Bernalillo and received from the proper officers of said county a certificate of his election to said office; that thereafter and within the time prescribed by law, the said Jesus Maria Sandoval duly qualified and entered upon the discharge of the duties of said office of assessor as aforesaid; but respondent denies that the said Jesus Maria Sandoval has ever since continued to be and still is the only person lawfully qualified to discharge the duties of said office and denies that the said Jesus Maria Sandoval is at the present time so qualified or has been so qualified since the tenth day of March, A. D. 1903.

2. Further answering the respondent says that he has no information as to whether or not the said Jesus Maria Sandoval has resigned his said office, but he denies that the said office did not become vacant and was not vacated by the said Jesus Maria Sandoval. Respondent admits that the term for which the said Jesus Maria
24 Sandoval was elected has not expired, that is to say, this respondent alleges that the said Jesus Maria Sandoval was elected to fill the office of assessor of the county of Bernalillo for the term beginning the first day of January, A. D. 1903, and the said term being for two years from said date; but this respondent alleges that the said office became vacant on the tenth day of March, A. D. 1903, in the manner hereinafter alleged.

3. This respondent further answering, alleges that on the 23rd day of March, 1903, this respondent was lawfully ap-ointed to said office as hereinafter alleged, and further alleges that the said office was vacant at the time he was so lawfully appointed, and denies that the said Jesus Maria Sandoval was in possession of the said office, engaged in the discharge of the duties thereof, and further answering, denies that by stealth and fraud and without authority of law did unlawfully usurp the said office and did unlawfully take possession of the room assigned for the use of the assessor of Bernalillo county in the court house of said county, and the books,

papers and other insignia of said office. Respondent alleges that after having been duly appointed and qualified as assessor by filing his bond and oath of office as required by law, on the day aforesaid, he demanded possession of the office and said books and papers from one Jesus Garcia, who was then the only person in actual possession of the same, he, the said Jesus Garcia, having been a deputy under the said Jesus Maria Sandoval and being then and there his representative in possession of the said office, books and papers, and that he, the said Jesus Garcia, so representing the said Jesus Maria Sandoval, peacefully surrendered possession of the said room and said books, papers and other insignia of office to this defendant without objection; and that at the time that he demanded the possession of the said office, books and papers from the said Garcia he presented to him an order from the county commissioner of the said county of Bernalillo, directed to the said Jesus Maria Sandoval, commanding him, the said Sandoval to deliver the said office, books and papers and insignia of office to this respondent.

4. Further answering this respondent admits that he has ever since assumed to be the assessor of Bernalillo county and alleges that he is the lawful assessor of said county, and denies that by any unlawful usurpation and intrusion he has become possessed of the said office of assessor and of the emoluments, immunities and privileges appertaining and belonging to the same, contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico, as alleged in said information, and alleges that he is the lawful incumbent thereof and entitled to the emoluments, immunities and privileges appertaining and belonging to the same.

5. For answer to the second cause of action in said information alleged, this respondent says that on the 23rd day of March, 1903, he, the said George F. Albright, was duly appointed assessor of the county of Bernalillo, and duly qualified as such as aforesaid by filing his bond and oath of office, by the board of county commissioners of Bernalillo county, acting under and by virtue of section 3 of an act of the Legislative Assembly of the Territory of New Mexico, entitled "An act to create the county of Sandoval, approved March 10, 1903," and as amended by an act entitled "An act to amend section 3 of an act entitled 'An act to create the county of Sandoval,'" approved March 12, 1903; and this respondent, further answering, denies that the said legislation was and is void in law and of no effect in so far as it attempted or pretended to authorize or empower the selection or appointment of any other person than the said Jesus Maria Sandoval to be assessor of the county of Bernalillo aforesaid for the unexpired part of the term for which the said Jesus Maria Sandoval had been theretofore elected by the qualified electors of Bernalillo county, as in the first count of said information set forth; and denies that the said act in said particulars is void in law because the said legislation attempts to deprive the said Jesus Maria San-

doval of his right to said office for the full term for which he was elected without due process of law and to deprive the said Jesus Maria Sandoval of the equal protection of law, and is therefore in contravention of the provisions of the Constitution of the United States and in that the said legislation is a special law regulating county affairs and granting special privileges to the board of county commissioners of Bernalillo county and is in contravention of the legislation of Congress and not within the grant of legislative power granted by Congress to the territorial legislature, in that the same is not, in so far as it attempts to deprive the said Jesus Maria Sandoval of the office of assessor of Bernalillo county for a portion of the term for which he was elected, a rightful subject of legislation by said territorial legislature, but respondent alleges that the said legislation is valid in every particular and fully authorized and empowered the county commissioners to appoint this respondent to said office.

6. Further answering, this respondent alleges that the office of assessor of the county of Bernalillo became and was vacant by reason of said legislation and creation of the county of Sandoval, it having been previously a part of the county of Bernalillo; said legislation being for the purpose of dividing the county of Bernalillo and
27 creating the county of Sandoval; that the Legislative Assembly, together with the governor of the said Territory, had full power and authority to pass said acts and every part thereof, and thereby vest in the county commissioners of Bernalillo county the power to appoint this respondent, or such other person as they saw fit to select, to the office of assessor for the new county of Bernalillo, as the same existed from and after the date of the passage of said acts. Respondent further alleges that the office was subject to the control of the Legislative Assembly and the governor of the Territory of New Mexico, legislating under the provisions of the organic act, and that a vacancy thereby was created by said acts above referred to.

7. Further answering, as to both of the said causes of action set up in the said information, this respondent alleges that by virtue of said act entitled "An act to create the county of Sandoval, approved March 10, 1903," and the act to amend the said act, approved March 12, 1903, there was created the county of Sandoval in the Territory of New Mexico, and that the said relator at the time of the creation of the said county of Sandoval by said acts, was and had been for a long time and many years previous thereto a resident of the portion of Bernalillo county which was incorporated into and made the county of Sandoval, and that by virtue of the passage of the said acts the said relator became and was, and still is, a resident of the said county of Sandoval and not of the county of Bernalillo. Thereupon the said relator ceased to be upon the passage of said acts a resident of the county of Bernalillo as constituted after the passage of the same, and was disqualified from exercising the duties of the office of assessor of the said county of Bernalillo as so constituted, and at the

time of the appointment and qualification of this respondent as such assessor by the board of county commissioners of the said
28 county of Bernalillo as newly constituted under the said acts of the Legislative Assembly, as alleged in said information, the said relator was a resident, as aforesaid, of that portion of the original county of Bernalillo which became and was a part of the newly created county of Sandoval, and continued to be such a resident, and still continues to be such a resident, and had not removed into that portion of the original county of Bernalillo which constituted the new county of Bernalillo after the passage of the said acts, and now constitutes the same. Respondent further alleges that the said relator always had been a resident of the territory now constituting the said county of Sandoval, prior to the passage of the said acts as aforesaid, and has ever since been a resident of the same, and had not removed into the territory constituting the county of Bernalillo after the passage of the said acts and now constituting the same, nor has he removed into the same up to this time. And respondent alleges that the office of assessor of the said county of Bernalillo as constituted by the passage of the said acts, became vacant and would have become vacant by reason of the facts hereinbefore last above alleged, even if the said acts had not declared the said office vacant, and respondent denies that the said relator is entitled or qualified to hold the office of assessor of the said county of Bernalillo as newly constituted, and can have any judgment in this cause entitling him to the possession of the said office; and the said respondent denies that he holds the said office and assumes to discharge the duties thereof wrongfully and contrary to the form of the statute in such case made and provided and against the peace and dignity of the Territory of New Mexico.

W. B. CHILDERS,
Attorney for Respondent.

29 TERRITORY OF NEW MEXICO, } ss.:
County of Bernalillo, }

George F. Albright, being duly sworn, on oath deposes and says that he is the respondent in the above entitled cause; that he has read the foregoing amended answer and knows the contents thereof, and that the matters and things contained therein are true.

GEORGE F. ALBRIGHT.

Subscribed and sworn to before me this 4th day of November, A. D. 1904.

[SEAL.]

E. L. MEDLER,
Notary Public.

And thereafter, on the 7th day of November, there was filed in the office of the clerk of the said court by the relator, a motion for judgment on the pleadings, which said motion is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS M. SANDOVAL, Relator,
vs.
GEORGE F. ALBRIGHT, Respondent. } No. 6395.

Motion for Judgment on the Pleadings.

Comes now the relator, by his attorney, and moves the court for judgment on the pleadings in this cause, and for cause of said motion shows to the court the following, that is to say:

I.

Because the amended answer filed herein by the respondent is frivolous and contains no material allegation not contained in the original answer.

30 II.

Because the defense attempted to be set up in the said amended answer is *res judicata*, and the said respondent seeks, by the said amendment, to obtain a reconsideration in this court of matters which have already been adjudicated adversely to the respondent by the supreme court of this Territory in this cause.

III.

Because it affirmatively appears from the allegations of the said amended answer that the relator is entitled to the said office of assessor of Bernalillo county, and that the respondent has no lawful right thereto.

IV.

Because the said amended answer does not state facts showing that respondent is entitled to hold the office of assessor of Bernalillo county, and is otherwise insufficient in law to constitute a defense to this action.

Wherefore relator prays the court to enter a judgment of ouster against the respondent and for costs, notwithstanding the said answer.

NEILL B. FIELD,
Attorney for the Relator.

Endorsed: "Filed in my office this Nov. 7, 1904. W. E. Dame, clerk."

And thereafter, on to-wit, the 19th day of November, 1904, there was entered in record in said cause objections of the respondent to the entry of certain parts of the judgment proposed to be rendered in said cause, which said objections are in words and figures as follows, to-wit:

31 TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

TERRITORY *ex Rel.* JESUS M. SANDOVAL }
vs. }
GEORGE F. ALBRIGHT, Respondent. }

To so much of the judgment in said cause as is proposed to be rendered and as is rendered, as reads as follows:

"That the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of assessor of the county of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico as the lawful custodian thereof."

Counsel for respondent objects, upon the ground that it is not a proper part of a judgment to be rendered in said cause, and is not supported by the pleadings or the mandate of the supreme court, or the action of the court in sustaining the motion treated as a demurrer in said cause to the amended answer of the respondent filed therein: which objection the court overrules, and to its action in overruling the same the respondent by his counsel excepts.

And thereupon, upon the said 19th day of November, 1904, there was entered of record in said cause a final judgment, which said judgment is in words and figures as follows, to-wit:

32 TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS MARIA SANDOVAL, }
Relator, }
vs. }
GEORGE F. ALBRIGHT, Respondent. }

This day this cause coming on to be heard, upon the motion of the relator for judgment upon the pleadings, and the court having read the same, and being fully advised in the premises, said motion is by the court sustained, as to the third and fourth paragraphs thereof.

Wherefore it is considered, ordered, adjudged and decreed by the court that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of assessor of the county of Bernalillo and Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with, or attempting to perform the duties, or exercise the functions of the office of assessor of the county of Barnalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico as the lawful custodian thereof.

It is further considered, ordered, adjudged and decreed by the court that the relator, Jesus Maria Sandoval, do have and recover of and from the respondent, George F. Albright, his costs in this behalf expended, to be taxed, and may have execution therefor.

33 To the rendition of the foregoing judgment the respondent hereby excepts and prays the court to grant him an appeal and to fix the amount of a bond for supersedeas and to grant him a supersedeas upon filing proper bond in accordance with the amount so fixed, to be approved by the court; which prayer for an appeal and for the fixing and acceptance of a supersedeas bond the court denies; and to which action of the court denying the same the respondent, by his counsel, excepts.

B. S. BAKER, Judge.

TERRITORY OF NEW MEXICO, } ss.:
County of Bernalillo, }

I, W. E. Dame, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, in obedience to the writ of error hereinbefore set forth, do hereby certify unto the supreme court of the Territory of New Mexico the above and foregoing as a true, correct and complete transcript and copy of so much of the record and proceedings had in the cause lately pending in said court for the county of Bernalillo, wherein The Territory of New Mexico *et al.*, were plaintiffs and George F. Albright was defendant, as same appears of record in my office, and as I was by said writ commanded to do.

In witness whereof I have hereunto set my hand and affixed the seal of said court on this 17th day of December, 1904.

[SEAL.] W. E. DAME, Clerk.

34 And afterwards on to-wit, on the 23rd day of December, A. D., 1904, there was filed in the office of the said clerk of the supreme court of the said Territory of New Mexico an assignment of errors in the above entitled cause, which said assignment of errors is in words and figures following to wit:—

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS MA. SANDOVAL, Defendant in Error,
vs.
GEORGE F. ALBRIGHT, Plaintiff in Error. } No. 1064.

Assignment of Errors.

Now comes the plaintiff in error in the above entitled cause and assigns for error committed by the district court in the above entitled cause the following, to-wit:

First. The district court erred in sustaining the third and fourth paragraphs and grounds of said relator's motion for judgment on the pleadings in said cause.

Second. The district court erred in rendering judgment upon the pleadings in said cause against the plaintiff in error.

Third. The district court erred in rendering and entering up as a part of said judgment, so much of the said judgment as reads as follows:

"That the said respondent, George F. Albright, do henceforth cease and desist from in any manner intermeddling with or attempting to perform the duties, or exercise the functions of the office of assessor of the county of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico as the lawful custodian thereof."

Fourth. The district court erred in refusing to grant the plaintiff in error an appeal and in refusing to fix the amount of a supersedeas bond and upon the giving of such bond granting him a supersedeas bond superseding said judgment as prayed for by said plaintiff in error.

W. B. CHILDERS,
Attorney for Plaintiff in Error.

And afterwards, on to wit, at a regular term of the supreme court of the Territory of New Mexico begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D., 1905, on the fifth day of the said regular term, the same being the 10th day of January, A. D., 1905 the following among other proceedings were had and entered of record following to wit:—

GEORGE F. ALBRIGHT, Plaintiff in Error, *vs.* TERRITORY *ex Rel.* JESUS MA. SANDOVAL, Defendant in Error.	No. 1046. Appeal from District Court, Bernalillo County.

This cause coming on before the court to be heard upon the motion of defendant in error to affirm or dismiss, and to quash the supersedeas herein, and upon the transcript of record, assignment of error, and briefs of counsel, is argued by William B. Childers, for plaintiffs in error, and Neill B. Field, Esq. for defendant in error and submitted to the court and the court not being sufficiently advised in the premises, takes the same under advisement.

36 And afterwards, on to wit, on the seventeenth day of the said regular term aforesaid, the same being the 24th day of February, A. D. 1905, the following among other proceedings were had and entered of record, following to wit:

GEORGE F. ALBRIGHT, Plaintiff in Error, *vs.* TERRITORY *ex Rel.* JESUS MA. SANDOVAL, Defendant in Error.	No. 1064. Error to District Court, Bernalillo County.

This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Pope, Chief Justice Mills and Associate Justices Parker, Mann, and McFie, concurring, modifying the judgment of the court below, by striking out the words "And that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico, as the lawful custodian thereof," and as so modified, affirming the said judgment of the court below, for reasons stated in the opinion of the court on file: It is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Bernalillo whence this cause came into this court, be, modified and as so modified affirmed, and that in accordance therewith; it is considered and adjudged by the court that the respondent George F. Albright, has unla-fully usurped and does unlawfully *usurp* the office of assessor of the county of Bernalillo and Territory of New Mexico, from the relator Jesus Ma. Sandoval, the lawf*y*l incumbent of the said office, that the said respondent, George F. Albright, do henceforth cease and desist from in any

manner intermeddling with, or attempting to perform the
37 duties, or exercise the functions of the office of assessor of the county of Bernalillo aforesaid, It is further considered, ordered, and adjudged and decreed by the court that the relator Jesus Ma. Sandoval, do have and recover of and from the respondent George F. Albright, his costs in this behalf expended to be taxed, and that he may have execution therefore.

And afterwards on to-wit, on the seventeenth day of the said regular term of the said supreme court of the Territory of New Mexico, the same being the 24th day of February, A. D. 1905 the following among other proceedings were had and entered of record following to wit:—

GEORGE F. ALBRIGHT, Plaintiff in Error, *vs.* TERRITORY *ex Rel.* JESUS M. SANDOVAL, Defendant in Error.	No. 1064. Error to District Court, Bernalillo County.

Now comes W. B. Childers, attorney for plaintiffs in error herein and prays the court for an appeal from the judgment and decision of this court, to the Supreme Court of the United States, and the court being sufficiently advised in the premises, grants the said motion. It is therefore considered and adjudged by the court that the plaintiff in error herein, do have an appeal from the judgment and decision of this court to the Supreme Court of the United States.

And afterwards on to wit on the eighteenth day of the said regular term, the same being the 25th day of February, A. D. 1905, the following among other proceedings were had and entered of record, as follows to wit:—

38 GEORGE F. ALBRIGHT, Plaintiff in Error, *vs.* TERRITORY *ex Rel.* J. M. SANDOVAL, Defendant in Error.	No. 1064. Error to District Court, Bernalillo County.

This cause coming on before the court upon a motion of plaintiff in error for a supercedeas herein, and asking the court to fix the amount of the said supercedeas bond, and the court having heard argument of counsel and had the matter under advisement, and being now sufficiently advised in the premises, grants the said motion, and fixes the amount of the supersedeas bond in the sum of fifteen thousand dollars ($15,000.00) the said bond to be approved by the chief justice of this court. It is therefore considered and adjudged by the court that the motion of plaintiffs in error herein for a supersedeas and to fix the amount of the supersedeas bond, hereby

is granted, and that the said supersedeas bond hereby is fixed at the sum of fifteen thousand ($15,000.00) dollars conditioned as provided by the rule 29th of the Supreme Court of the United States, which said supercedeas bond shall be approved by the chief justice of this court, and that upon the filing of the supersedeas bond herein, supersedeas shall issue.

And afterwards on to wit: on the 11th day of March, A. D., 1905, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a supersedeas bond in the above entitled cause, which said supersedeas bond was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS MA. SANDOVAL,
Defendant in Error,
vs.
GEORGE F. ALBRIGHT, Defendant in Error.

Bond.

Know all men by these presents, that we George F. Albright
39 as principal, and William H. Greer, Willard S. Strickler, and Solomon Luna, as his sureties, are held and firmly bound unto the Territory of New Mexico, for the use and benefit of Jesus Ma. Sandoval to the extent that he may show himself interested in the same, and also to the said Jesus Ma. Sandoval, in the sum of fifteen thousand ($15,000.00) dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, firmly by these presents.

Signed, sealed and dated this the 27th day of February, 1905.

The conditions of the foregoing obligation is such that whereas the said George F. Albright, the plaintiff in error in that certain suit lately pending in the supreme court of the Territory of New Mexico, entitled, Territory *ex rel.* Jesus Ma. Sandoval, defendant in error, versus George F. Albright, plaintiff in error, has sued out an appeal from the judgment of the said supreme court of the Territory of New Mexico, affirming the judgment of the district court of the second judicial district of the Territory of New Mexico, for the county of Bernalillo, in which said suit originated, for the purpose of reviewing the judgment of the said supreme court, of the Territory of New Mexico, rendered against him; and whereas the amount of the bond for the purpose of fixing a supersedeas has been fixed by the supreme court of the Territory of New Mexico, and the chief justice thereof, at the sum of fifteen thousand ($15,000.00) dollars;

Now therefore, if the above bounden principal shall prosecute his said appeal and make his plea good and answer all damages

and costs that may be adjudged against him on said appeal if he fail to make his plea good, should said appeal be dismissed or the judgment and determination of the said supreme court of the
40 Territory of New Mexico affirmed, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

(Signed) GEORGE F. ALBRIGHT. [SEAL.]
W. S. STRICKLER. [SEAL.]
SOLOMON LUNA. [SEAL.]
W. H. *H*REER. [SEAL.]

TERRITORY OF NEW MEXICO, County of Bernalillo, } ss:

On this the 27th day of February A. D., 1905, before me personally appeared George F. Albright, principal and W. S. Strickler surety upon the above and foregoing bond, and they each acknowledged to me that they executed the same as their free act and deed. And the said W. S. Strickler —— ——, sureties upon said bond, being by me each severally sworn, did say, each for himself and not one for the other that he is worth the amount set opposite to his name below in property situate in the Territory of New Mexico, over and above his just debts and liabilities and the amount by law exempt from execution and forced sale.

(Signed) W. S. STRICKLER, $5000.00.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

(Signed) R. M. MERRITH,
[NOTARIAL SEAL.] Notary Public.

TERRITORY OF NEW MEXICO, County of Santa Fe, } ss:

On this the 3rd day of March, A. D., 1905, before me personally appeared Solomon Luna —— ——, sureties upon the above and foregoing bond, and they each severally acknowledged to me that they executed the same as their free act and deed. And the said Solomon Luna —— —— sureties upon said bond, being by me each severally sworn, did say, each for himself and not one for the
41 other, that he is worth the amount set opposite to his name below in property situate in the Territory of New Mexico, over and above his just debts and liabilities and the amount by law exempt from execution and forced sale.

(Signed) SOLOMON LUNA, $5000.00.

In witness whereof, I have hereunto set my hand and
[SEAL.] affixed my official seal the day and year last above written.

P. F. KNIGHT,
Notary Public.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

On this the 7th day of March, A. D., 1905, before me personally appeared William H. Greer, surety upon the above and foregoing bond, and he acknowledged to me that he executed the same as his free act and deed.

And the said William H. Greer, surety upon said bond, being by me duly sworn, did say that he is worth the amount set opposite to his name below in property situate in the Territory of New Mexico, over and above his just debts and liabilities and the amount by law exempt from execution and forced sale.

(Signed) WM. H. GREER, $5000.00.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

FRANK A. STORTZ,
Notary Public.

The foregoing bond as to amount and sufficiency is hereby approved.

WILLIAM J. MILLS,
Chief Justice, etc.

March 9, A. D., 1905.

42 And heretofore, on to wit, on the 19th day of November, A. D. 1903, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, an assignment of errors in a certain cause therein pending, entitled The Territory of New Mexico, *ex rel.* Jesus Ma. Sandoval, appellant, *versus* George F. Albright, appellee, numbered 1023 on the docket of the said court, which said assignment of errors is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1904.

TERRITORY OF NEW MEXICO *ex Rel.* J. M. SANDOVAL, Appellant, *vs.* GEORGE F. ALBRIGHT, Appellee. } No. 1023.

Assignment of Errors.

Now comes the said appellant by Edward L. Bartlett, solicitor general, and shows to the court here that in the record, proceedings and judgment of the district court of the county of Bernalillo, in the above entitled cause there is manifest error in this, to-wit:

I. The said district court erred in overruling the demurrer of appellant to the answer of appellee.

II. The district court erred in holding that the board of county commissioners of Bernalillo county had lawful authority to appoint appellee to the office of assessor of Bernalillo county.

III. The district court erred in holding that the appellee is entitled to the office of assessor of Bernalillo county.

IV. The district court erred in holding that the relator is not entitled to the office of assessor of Bernalillo county.

V. The district court erred in refusing to render judgment in favor of appellant.

43 VI. The district court erred in rendering judgment in favor of appellee.

Wherefore said appellant prays that the said record and proceedings and judgment may be seen and examined by this honorable court, errors therein corrected, said judgment reversed, and that appellant may be restored to all things which it hath lost by reason thereof.

E. L. BARTLETT,
Solicitor General for the Territory of New Mexico.

And afterwards, on to-wit at a regular term of the supreme court of the Territory of New Mexico, begun and held at Sante Fe, the seat of government on the first Wednesday after the first Monday in January, A. D., 1904, on the sixth day of the said regular term, the same being Wednesday the 13th day of January A. D., 1904, the following among other proceedings were had and entered of record in the above entitled cause, to wit:

TERRITORY OF N. M. *ex Rel.* JESUS M. Sandoval, Appellant, *vs.* GEORGE F. ALBRIGHT, Appellee.	No. 1023. Appeal from District Court, Bernalillo County.

This cause having come — for hearing upon the transcript of record assignment of errors and briefs of counse-, is argued by Neill B. Field, Esq. for appellant, and W. B. Childers, Esq. for appellee, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to-wit on the twenty-fourth day of the said regular term, the same being Tuesday, September, 13th, A. D. 1904 the following among other proceedings were had and entered of record in the above entitled cause, as follows, to-wit:

44 TERRITORY OF NEW MEXICO *ex Rel.* Jesus Ma. Sandoval, Appellant, vs. GEORGE F. ALBRIGHT, Appellee. } No. 1023. Appeal from District Court, Bernalillo County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises announces its decisions by Associate Justice McFie, Chief Justice Mills and Associate Justice- Pope and Parker concur-ing, reversing the judgment of the court below and remanding this cause to the court below with instructions to reinstate the same and to proceed in accordance with this opinion, for reasons stated in the opinion of the court on file; it is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Bernalillo whence this cause came into this court be and the same hereby is reversed and this cause remanded to the district court with instructions to the said district court to reinstate this cause upon the docket and to proceed in accordance with this opinion and the views therein expressed. It is further ordered that the appellant herein do have and recover of the appellee his costs in this behalf expended to be taxed. It is ordered that the appellants be and they hereby are granted ten days to file motion for rehearing herein.

And afterwards on to-wit on the 21st day of September, A. D., 1904, there was filed in the office of the clerk of the said supreme court, a motion for a rehearing in the above entitled cause, which said motion for a rehearing was and is in words and figures following to-wit:—

45 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1904.

TERRITORY OF NEW MEXICO *ex Rel.* JESUS Ma. Sandoval, Appellant, vs. GEORGE F. ALBRIGHT, Appellee. } No. 1023. Appeal from District Court, Bernalillo County.

Motion for Rehearing.

Now comes the appelle- in the above entitled cause and moves the court to grant him a rehearing in said cause, and to permit the said cause to be reargued, for the following reasons, to-wit:

First. The court is wrong in its opinion and holding that it is necessary that the acts of the legislature involved in this cause should

expressly declare vacant the office of assessor for that portion of the old county of Bernalillo left as such county after the creation of the county of Sandoval. The provision in the act as first passed, that an election should be held on the 14th day of April, 1903, for the election of two county commissioners; one probate judge and one assessor; who at the time of their election should be "actual *bona fide* residents of the county of Bernalillo as the same shall be constituted after the passage of this act"—was an express declaration that those offices should be vacant by the passage of the act, the vacancies to be filled at said election, and that only residents of the county as it would then be constituted should be eligible to these offices. To hold otherwise is to give no meaning whatever to the language or intention of the legislature. The second act, appointing T. C. Gutierrez and Severo Sanchez county commissioners, and providing that they together with the county commissioner then in office should constitute
46 the board of county commissioners of the county, and that they should qualify on or before the fifth day of April, and hold a meeting not later than the tenth day of April, and appoint an assessor and one probate judge for said county, had the effect of amending the original act so that the county of Bernalillo as newly constituted came into existence "on or before the fifth day of April, 1903." The act took effect from and after its passage; both acts are to be construed together, the latter act controlling wherever there was a conflict; as to that, the later act operated as a repealing act *pro tonto*. The meaning is plain. The power of the legislature to enact it is an entirely different question.

Second. No authority can be cited for the contention of the court that an express declaration that, "the office of assessor is hereby declared vacant" is necessary to show the intent of the legislature—unless the idea that the legislature intended that there should be two independent assessors for the county is to be entertained. No other construction can be placed on these two acts, except that they intended to create a vacancy.

Third. The court argues that the legislature acted upon a false assumption as to the law, "That the creation of the new county of Sandoval necessarily created a vacancy in the office of all such officers of the old county as resided within the geographical limits of the new county." The court has no power to question the validity of legislation on such grounds. The intention of the legislature is to be inferred solely from the language used by it, if unambig-ous, and it is so in this case. Its assumptions and reasonings, whether sound or not, are immaterial. If the legislation violates no constitutional restrictions, the sole duty of the courts, is to arrive at the meaning of legislation and enforce it.

Fourth. The supreme court of Alabama held in a case fully considered, exactly the contrary of the principle enunciated by the court in this case. We quote from it:—

47 "The abrogation or withdrawal of that power (the power of appointment) and the substitution of a new appointive power in another body, necessarily *ipso facto, annulled the tenures of their appointees, there being nothing in the act retaining them in office.*" Fox vs. McDonald, 21 L. R. A., 537; citing, Lane vs. Kolb, 92 Ala. 636, State vs. Bd. of Public Lands, 7 Nebr. 42.

When the legislature provided a mode of filling the office and the time when it should be filled, and that time was before the expiration of the term to which the relator had been elected it *ipso facto* and necessarily annulled the *tenure* of the relator as assessor of Bernalillo county.

Fifth. The court erroneously assumes that the legislature would not have attempted to abridge the tenure of the relator, if its members had known that the creation of the new county did not necessarily create a vacancy. The reasons or policy for the enactment of legislation, as above stated, is not a matter for the consideration of the courts. The interpretation of its meaning from the language used, and the determination of its constitutionality, are the sole prerogatives of the court.

Where there is no ambiguity in a statute there is no room for construction." Chief Justice Marshall in U. S. vs. Wiltberger, 5 Wheat. 95.; see also, directly to same effect Lewis vs. U. S., 92 U. S., 621; Morgan vs. Railroad, 96 U. S., 722.

"The Statute is clear and imperative * * * it contains no qualifications. We cannot interpolate what is claimed. Such a function is beyond the sphere of our power and duty. It is our business to execute the law as we find it, and not to make or modify it. Bank vs. Sherman, 101 U. S. 406.

"The primary and general rule of statutory construction, is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of the
48 words and the rules of grammer." Justice Brewer in U. S. vs. Goldenberg, 168 U. S. 102.

We assert without the fear of contradiction that no case can be found anywhere justifying the court, as it does in this case, in assuming that the legislature was mistaken as to the law,—that if it had not been so mistaken, it would not have passed a law, which is plain and unambiguous in its terms. The cases cited do not sustain any such power in the court, or suggest any such rule of construction. The reading of the first case cited for this in the opinion, Postmaster General vs. Early, lays down the very opposite rule. The quotation made from it, "A mistaken opinion of the legislature concerning the law does not make law," was an answer by Chief Justice Marshall to the argument that because the legislature may have been mistaken as to the law, therefore the words of the statute should receive a different meaning from what they would usually imply. He followed the statute and upheld it. The very next sentence in the opinion is a complete answer to the contention of the learned judge who wrote this opinion. It is as follows:

"*But if this mistake is manifest in words competent to make the lay in future, we know of no principle which can deny them this effect.*" Chief Justice Marshall in Postmaster General vs. Early, 12 Wheat., 148.

The other cases cited in the opinion are cases where it appeared that the legislature was mistaken as to whether or not some statute was in force. This the courts say was a judicial question and the courts could not indulge the false assumption of the legislature,—a mistake as to general substantive law or a disagreement with the court as to it,—as a reason for enacting another rule, is something the courts cannot consider. If they could the mere suggestion that the legislature was mistaken as to the law, or if they were not they would not have enacted the particular statute, would suffice
49 to destroy almost all the laws enacted by the legislature and substitute the court for the legislature.

Sixth. The court is in error when it contends that there is no provision in our law requiring the assessor to be a resident of the county. See section 772 Compiled Laws of 1897, paragraph fifteenth, section 664, Compiled Laws, required all officers appointed to fill vacancies to be residents of the county.

Chapter 2 acts of 1901, simply transfers the appointing power from the county commissioners to the governor and still leaves the qualification of residence in force.

Seventh. The court is in error when it contends that it is necessary that there should be an express provision making residence a qualification to hold office, and that the provisions of the organic act alone apply in this case. Neither the organic act, nor the legislature, except in the statutes I have cited, have expressly provided that any citizen of the United States, although a non-resident of New Mexico, may not hold the office of assessor in any county in the Territory. If would, therefore, necessarily and logically follow, if the court is right, that any citizen of the United States, although a resident of Colorado or any other State, could lawfully be elected to, and hold the office of assessor, in any county in New Mexico.

Eighth. The court argues that the amendatory act, chapter 49, does not require residence. Nothing is better established than that those two acts are to be construed together as one act.

"Statutes passed at the same session on the same subject are to be construed as one act." Sedewick on construction of statutes; Bronw vs. Barry, 3 Dallas, 364; U. S. vs. Freeman, 3 How., 564; Cain vs. State, 20 Texas 355; People vs. Jackwon, 30 Cal. 427; St. Martins v. New Orleans, 14 La. Ann. 113; Fouke v. Fleming, 13 Md. 392; Powers vs. Sheppard, 48 N. Y. 543, Sutherland on Stat. Cons., sec. 283; Town of Highgate v. State, 59 Vt. 39; Endlich on Interpretation of Statutes, 202; Fussel vs. Gregg, 113 U. S., 560.

50 Under this rule of construction how can the court be misled by such a suggestion.

Ninth. The court makes an entire erroneous application of the case of Postmaster General vs. Early, 12 Wheaton 148, and of the

case of Columbia vs. Hatton, 143 U. S., 27, as we will endeavor hereafter to show:

Tenth. The answer alleges (folio-54–5); "That the said relator at the time of the creation of said county of Sandoval was and had been for a long time and many years privious thereto, a resident of the portion of Bernalillo county which was incorporated into and made the county of Sandoval, and that by virtue of the passage of said act, creating the county of Sandoval, the said relator became and still is a resident of the said county of Sandoval and not of the county of Bernalillo."

All this the demurer to the answer admits.

The answer filed on July 23rd, 1903. It was admitted then that on the 23rd day of July, A. D., 1903, the relator had not become a resident of Bernalillo county as constituted after the creation of the county of Sandoval. We admit that the court cannot hold, even if it concludes that such is the law, that the relator's rights are affected in any way, by any claim of right to have time to remove into the old county as newly constituted, and that this claim, which is discussed on page 25, becomes wholly immaterial in this case. We further submit that even though the restrictions of the organic act, name two county commissioners in the act and authorize the board to appoint an assessor, it by no means follows that the relator is entitled to the office.

Eleventh. The authorities cited by the court for the proposition that in cases of division of Territory, and the creation of new districts, counties, etc., the old officer is entitled to a reasonable time to qualify himself by removing into the new demarcation were nearly all of them discussed in appellee's brief. A vital distinction appears in all these cases between an office created by the
51 constitution and one created by the legislature. We submit that the court has entirely overlooked this distinction.

Twelfth. It is useless to contend that a division of the counties had not taken place as soon as the board in what remained of the old county qualified, organized and acted. Nor does the court give any reason or authority for its position that an officer could not be appointed and qualified in advance of the time when he is to enter upon the discharge of the duties of his office.

Thirteenth. The conslusion of the court, except so fas as it may rest upon the Springer act, (and as to this contention we expressly refer to the motion for a rehearing in the case of The Teritory vs. Gutierrez, *et al.*, No. 1022) are in conflict with the principles laid down in the following cases, binging upon this court: Butler v. The Commonwealth, 10 How. 416; Crenshaw vs. United States, 134, U. S., 99.

In the latter case it is said by Mr. Justice Lamar:

"Whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him. The question is not novel. There seems to be but little difficulty in deciding that there was no

such interest or right." Butler v. Pennsylvania, *supra* Newton vs. Commissioners, 100 U. S., 548; Blake vs. United States, 103, U. S. 227; and many other cases.

And Taylor vs. Beckham, 178 U. S., 576.

And the court does not refer to or discuss these cases. The contention that this legislation conflicts with the Springer act is a different proposition and arises in the motion filed in the commissioner case. If not restricted by this act, the power of the legislature over this office is as complete as that of Congress over any office depending for its existence simply upon congressional Cnactment, and not upon the Constitution.

52 Fourteenth. Finally, this court, in cases involving important constitutional questions, ordered reargument where there have been changes on the bench, by the addition of new members or otherwise.

We respectfully submit that the importance of the questions involved require a reargument of this case.

(Signed) W. B. CHILDERS,
Attorney for Appellee.

And afterwards, on to wit on the twenty-eighth day of the said regular term of the supreme court of the Territory of New Mexico, the same being the 17th day of October, A. D., 1904 the following among other proceedings were had and entered of record as follows to-wit:

TERRITORY OF NEW MEXICO *ex Rel.* J. M. Sandoval, Appellant, vs. GEORGE F. ALBRIGHT, Appellee.	No. 1023. Appeal from District Court, Bernalillo County.

This cause coming on for hearing upon a motion of appellee herein for a rehearing, and the court having had the said motion under advisement and being sufficiently advised in the premises, denies and overrules the same, it is therefore, considered and adjudged by the court that the motion of appellee herein for a rehearing, be and the same hereby is overruled and denied.

And afterwards on to wit the 13th day of September A. D., 1904 there was filed in the office of the clerk of the supreme court an opinion by the court in the above entitled cause numbered 1023, which said opinion was and is in words and figures following to-wit:

53 (Supreme Court of New Mexico, Sept. 13, 1904.)

TERRITORY *ex Rel.* SANDOVAL
v.
ALBRIGHT.

Counties—Division—County Officers—Appointment.

1. Laws 1903, p. 38, c. 27, § 3, was a portion of an act dividing Bernalillo county so as to create the new county of Sandoval, and provided that on or before April 1, 1903, the county commissioners of the present county of Bernalillo should give notice of an election to be held on April 14, 1903, in the county as it would be constituted after division, to elect certain officers, including a county assessor, and that the officers so elected should be actual *bona fide* residents of Bernalillo county, as constituted after its division pursuant to the act. Section 16 (page 43) provided that the act should take effect on and after April 14, 1903, at which date the officers elected at the special election should assume their respective duties. Laws 1903, p. 80, c. 49, amended the act quoted by appointing two persons county commissioners for Bernalillo county after division, and providing that they should appoint an assessor not later than April 10, 1903. *Held*, that an assessor appointed pursuant to this amendment on March 23, 1903, which was before the act dividing Bernalillo county went into effect, was not entitled to the office.

Appeal from District Court, Bernalillo County; before Justice Baker.

Quo Warranto by the Territory, on Relation of Jesus M. Sandoval, against George F. Albright. From a Judgment for Respondent, Relator Appeals. Reversed.

This is a proceeding by information in the nature of *quo warranto* brought to try the title of the appellee, George F. Albright, to the office of assessor of the county of Bernalillo. The information alleges that the relator, Jesus M. Sandoval, was duly elected assessor of Bernalillo county at the general election held on the 4th day of November, 1902; that within the time prescribed by law the relator duly qualified and entered upon the discharge of the duties of the office; that the relator has never resigned, vacated or abandoned the said office; that ever since his election and qualification he has continued to discharge the duties of the office; and that the term for which he was elected has not expired. The information further alleges that on the 23d day of March, 1903, and while the relator was in lawful possession of, and in the discharge of the duties of, said office, the respondent, George F. Albright, without authority of law,

did unlawfully usurp the said office, and take possession of the room assigned for the use of the assessor of Bernalillo county in the courthouse, and of the books, papers, and other insignia of said office; has unlawfully assumed to be the assessor of said county, and by such unlawful usurpation and intrusion the respondent has become possessed of the emoluments, immunities, and privileges thereof. The information further alleges that the respondent claims the office by virtue of a pretended appointment by the board of county commissioners of Bernalillo county, which was pretended to be made under authority of act of the legislative assembly of the Territory of New Mexico entitled "An act to create the county of Sandoval," approved March 10, 1903 (Laws 1903, p. 37, c. 27), as amended by an act entitled "An act to create the county of Sandoval," approved March 12, 1903 (Laws 1903, p. 80, c. 49). The information further alleges that said legislation was and is void, in so far as it attempted to authorize or empower the selection or appointment of any other person than the relator to the office of assessor of the said county, for the term, or any part of the term, for which said relator was elected by the people of Bernalillo county; that said legislation is in contravention of the Constitution of the United States, and also the laws of Congress prohibiting special legislation regulating county affairs, and is not a rightful subject of legislation.

The acts of the legislature, in so far as they are involved in this case, are sections 3, 16, c. 27, pp. 38, 43, Laws 1903, and c. 49, p. 80, Laws 1903, and are as follows:

Chapter 27 ("Act Creating Sandoval County").

"SEC. 3. On or before the first day of April, 1903, the county commissioners of the present county of Bernalillo, shall give notice of an election to be held on the fourteenth day of April, 1903, within the county of Bernalillo as the same will be constituted after the passage of this act, for the election of two county commissioners, one probate judge, and one assessor, to serve until their successors are elected and qualified at the next general election. Said officers so named in this section to be at the time of said election actual *bona fide* residents of the said county of Bernalillo as the same shall be constituted after the passage of this act. The returns of said election to be made as the returns of general elections are made."

"SEC. 16. This act shall take effect and be in force on and after the fourteenth day of April, 1903, at which date or as soon thereafter as qualified the first officers of said county elected at the special election of 1903 shall assume their respective duties, and the said county shall be fully established as a county in the Territory of New Mexico, and the provisions herein contained providing for a returning board and its action in calling the election and canvassing the votes, and the method of ascertaining the debt of Sandoval county, to Bernalillo county, shall take effect and be in force from and after the passage of this act."

Chapter 49 (Amending Above Act).

"SECTION 1. That section 3 of the act to create the county of Sandoval, approved on March 10th, 1903, be and the same is hereby amended so as to read as follows:

"'SEC. 3. That T. C. Gutierrez, to fill the unexpired term of the second district, and Severo Sanchez, be and they hereby are appointed and constituted county commissioners for the county of Bernalillo, as the same is constituted after the creation of Sandoval county, and the said T. C. Gutierrez and Severo Sanchez shall qualify as said county commissioners on or before the fifth day of April, 1903, and shall together with the county commissioner now in office for the said county of Bernalillo, hold a meeting not later than the tenth day of April, 1903, and said three persons as a board of county commissioners for Bernalillo county shall appoint one assessor and one probate judge for the said county of Bernalillo to serve until their successors are elected and qualified at the next general
54 election.'

"SEC. 2. On or before thirty days after said board of county commissioners of Bernalillo county has duly qualified as such commissioners, they shall assemble as a board of county commissioners and shall divide said county of Bernalillo into county commissioner districts.

"SEC. 3. This act shall be in force and take effect from and after its passage."

To this information a demurrer was filed and overruled. Respondent then filed answer, in which it is admitted that the relator was duly elected for the term of two years, and duly qualified and entered upon the discharge of his duties as such assessor, as alleged in the information; but he denies that the relator was the only person qualified to hold the said office, and denies also that the office did not become vacant, alleging that the office became vacant March 10, 1903, the date upon which the act was approved creating Sandoval county, and that the relator was at the time of filing the information, and had been for a long time previous thereto, a resident of that portion of Bernalillo county incorporated into Sandoval county by the act of March 10, 1903, and was disqualified from holding the office of assessor of Bernalillo county. The answer avers that the respondent, Albright, was duly appointed under the provisions of the act creating Sandoval county and the act amendatory thereof, and that he was duly qualified and lawfully entered upon and continued to discharge his duties as such assessor. The answer further denies that the acts of the legislature are void, that they are in contravention of the Constitution or laws of the United States, that the same are special legislation prohibited by the acts of Congress, or that the same are not rightful subjects of legislation as set forth in the information. A

demurrer was filed to the answer, which was by the court overruled, and judgment was rendered in favor of the appellee. From that judgment this appeal is prosecuted.

Edward L. Bartlett, sol. gen., and Niel B. Field, for appellant. W. B. Childers, for appellee.

McFIE, J. (after stating the facts):

In deciding this case in the court below, the learned judge who tried the cause held that section 3, c. 27, p. 38 Laws 1903, and section 1, c. 49, p. 80, Laws 1903, in effect declared the office of assessor of Bernalillo county vacant. In construing these sections the court arrived at the conclusion that it was the intention of the legislature to declare that office vacant, and therefore, although those sections do not contain a declaration to that effect, the court was of the opinion that those sections should be given the effect of such a declaration We cannot concur with the trial court in this conclusion. The facts admitted by the pleadings are that the relator, Jesus M. Sandoval, was elected by the people of Bernalillo county at a general election held on the 4th day of November, 1902, to the office of assessor of the county; that he duly qualified on the 1st day of January, 1903, and entered upon the discharge of the duties of the office, that the term for which he was elected was two years from the date of his qualification; and that he did not resign, vacate, or abandon the office voluntarily. It must be conceded, therefore, that Mr. Sandoval was still the assessor of that county, unless the legislature by the acts referred to declared the office vacant in express terms or clearly intended so to declare. That the legislature did not so declare in express terms will not be denied. Therefore we must examine the legislation involved with a view of ascertaining what the intention of the legislature was in relation to the office of assessor of Bernalillo county; that being the only office directly involved in the case.

Chapter 27, p. 37, Laws 1903, is an act for the creation and government of the new county of Sandoval. It is not reasonable to take the view that by such legislation it was the intention of the legislature to deprive officers elected by the people of the old county of offices held by them, and against their will and consent, unless such legislation necessarily has the effect of vacating such offices. The old county does not become a new county by the withdrawal of some of its territory. Its organization remains the same, and only such changes can, of right, be made, as necessarily result from the formation of the new county. In such case legislation relating to those holding office in the old county should not be given the effect of declaring such office vacant, unless the intention to do so is manifest. Nothing should be left to the realm of doubt or inference; for, as was said in the case of Territory v. Ashenfelter, 4 N. M. (Gild.) 147, 12 Pac. 879, removal from office "deprives the possessor of a valuable private right." Section 3, c. 27 (page 38), simply provides

for the election by the people of two county commissioners, one probate judge, and one assessor for the county of Bernalillo, as the same will be constituted after the taking effect of the act creating Sandoval county, and further provides for the giving of notice for such election and how the returns shall be made. There is not one word in that section declaring those offices vacant; nor is there such in the entire chapter, for that matter. This omission is very significant, inasmuch as it clearly indicates that the legislature was acting upon the assumption and theory that the creation of the new county of Sandoval necessarily created a vacancy in the offices of all such officers of the old county as resided within the geographical limits of the new county. This seems to be a much more reasonable interpretation of the act than that the legislature intended to single
55 out certain officers and declare their offices vacant in the midst of their terms, without any reason being assigned as an exercise of a purely arbitrary power.

In support of the construction given this act by the learned judge who tried the cause, reference was made to the case of Territory v. Van Gaskin, 6 Pac. 30. In this case the supreme court of Montana sustained a legislative act making appointments to fill vacancies but by reference to the act under consideration in that case it will be found that the act in terms declared the offices of the former commissioners vacant and then proceeded to fill the vacancies. The act was as follows: "That the offices of county commissioners of the county of Custer be, and the said offices are, hereby declared to be vacant, and no official duty shall be performed by the persons constituting the present board of county commissioners, except to make reports, * * * and that William Van Caskin, George M. Miles, and Thomas J. Ryan are hereby appointed commissioners of Custer county." The legislature of Montana first declared the offices vacant and then filled them by direct appointments. The legislature of this territory, however, did not declare the office of assessor of the old county vacant, but provided in one act for the election by the people of an assessor, and by a subsequent act, two days later, that the county commissioners should appoint an assessor for Bernalillo county.

It is difficult to account for the failure of the legislature to declare a vacancy in the office of assessor, except upon the theory that the legislature was of the opinion that the holder of the office resided in the new county, and that the passage of the act creating the new county rendered the assessor of Bernalillo county ineligible to hold the office to which he had been elected. That this was the view taken by counsel for the respondent when the answer was prepared appears from the following paragraph of the answer: "Further answering, this respondent alleges that by virtue of an act entitled 'An act to create the county of Sandoval,' approved March 10, 1903, there was created the county of Sandoval in the Territory of New Mexico, and that the said relator at the time of the creation of said county of Sandoval was, and has been for a long time and many

years previous thereto, a resident of the portion of Bernalillo county which was incorporated into and made the county of Sandoval, and that by virtue of the passage of said act creating the county of Sandoval the said relator became and was and still is a resident of the said county of Sandoval, and not of the county of Bernalillo, and therefore the said relator ceased to be, upon the passage of said act, a resident of the county of Bernalillo, and was disqualified from exercising the duties of the office of assessor of the said county of Bernalillo to which he had theretofore been elected."

If, then, the legislature did not intend to declare a vacancy, but only intended to provide an officer to fill a vacancy believed to exist as a necessary result of the passage of the act creating Sandoval county, upon the theory that residence in the new county disqualified the assessor from continuing to hold his office, the effect is the same as if the legislature had no power to declare or fill a vacancy. It does not seem necessary or profitable in this case, to consider the question of the power of the legislature, for the reason that, however adequate the power of the legislature might be, if the legislature did not see fit and had not intended to exercise the power to declare the office of assessor of Bernalillo county vacant by the legislation enacted, the legal right of the incumbent elected by the people of the county is not affected by the legislation, and no vacancy existed, to be filled either by election or by appointment. Providing for the election or appointment of a successor for a legally qualified incumbent of an office is of no effect whatever, so far as the incumbent is concerned, prior resignation, abandonment, or expiration of the term for which he was elected, neither of which occurred in this case, as is admitted by the pleadings.

Respondent's counsel insists, however, that because the relator, Sandoval, resided within the geographical limits of Sandoval county, and was not a resident of Bernalillo county, wherein he was elected, the legal effect of the enactment of the law creating Sandoval county was to disqualify him for holding the office to which he had been elected in Bernalillo county, and that the passage of that act *ipso facto* created a vacancy in the office for which a successor was provided. In our opinion, this position is not well taken, either as to the disqualification of Sandoval or the creation of a vacancy in the office of assessor held by him at the time the laws referred to were enacted. An examination of our statutes fails to disclose any provision requiring residence in the county as a qualification for holding the office of assessor. In section 5 of the organic act it is provided that members of the council and house of representatives shall reside in their respective districts; and section 6 provides: "And be it enacted that every free, white male inhabitant above the age of twenty-one years, who shall have been a resident of said Territory at the time of the passage of this act, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory; but the qualifications of voters and of holding office at all subsequent elections shall be such as shall

be prescribed by the legislative Assembly." The legislature is, by this section, clothed with power to create the office of county assessor, and prescribe as one of his qualifications for office that he shall reside in the county for which he is elected to serve. The office of county assessor in New Mexico was created by act
56 of 1884. Sections 772 to 775, inclusive, Comp. Laws 1897, appear to embrace all the provisions of our laws in regard to that office, and the qualifications, manner of selection, and tenure of that officer, except as to the filling of vacancies. There is no residence qualification provided for. Section 664, Comp. Laws 1897, provides for the filling of vacancies in county offices, except that of county commissioners, and does not provide that in filling such vacancies the person appointed shall be a resident of the county. The manner of filling vacancies in county offices was changed by chapter 2, p. 18, Laws 1901, the power being vested in the governor; but this act does not include a residence qualification. Section 3, c. 27, p. 38, Laws 1903, also provides that the officers to be elected shall reside in the county of Bernalillo; but chapter 49 does not so provide.

At the time the legislation in question was enacted, there was no statutory provision for a residence qualification applicable to the office of county assessor, and the court should not ingraft upon the statute by construction a qualification which the legislature, with full power to act, has seen fit to omit. We are thus logically led to the conclusion that, even if it was admitted that Sandoval had been for years and was still residing in what would become Sandoval county when the act took effect, that fact would neither disqualify Sandoval from holding his office nor have the effect of rendering the office vacant. The legislature acted upon a mistaken view of the law, the result of which was to provide for the election of an officer to an office not vacant, but which, on the contrary, was in the possession of a legally elected and qualified incumbent.

In the case of Postmaster General v. Early, 12 Wheat. 148, 6 L. ed. 577, Chief Justice Marshall, in delivering the opinion of the court, said: "It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts, rather than intention to give it; and a mistaken opinion of the legislature concerning the law does not make law." In the matter of John Hersom, 39 Me. 481, the court said: "It is said that the intention of the legislature to confer such a jurisdiction is clearly ascertainable from the provisions of the act, and that such intention should be made effectual. The intention of a legislative body is by the law regarded as a rule for a court to determine what construction the language which the legislature has used should receive. But no rule of construction is known or admitted by which a clearly perceived defect or omission in legislation to accomplish an important purpose in criminal law has been or can be supplied by inferring it from language used for another purpose, not suited nor intended to supply that defect. Even in the construction of wills, in which the inten-

tion of the testator is to be pre-eminently the guide of the court, that intention cannot, however clearly discoverable, be made effectual, if there be found in the will no language used by which the object can be accomplished." In District of Columbia v. Hutton, 143 U. S. 27, 12 Sup. Ct. 372, 36 L. ed. 60, the court said: "It is contended, however, that by the act of January 31, 1883 (22 Stat. 412, c. 41; Supp. Rev. St. [2d ed.] 397) Congress recognized said section 354 as a still subsisting law, and that that consideration should compel a reversal of the judgment below. We are not impressed with this contention. But, even if Congress had supposed that that section was still the law, when as a matter of fact it had been repealed, it would make no difference in this consideration." So in this case we find no language in the act which can reasonably be held to declare a vacancy in the office of assessor of Bernalillo county; nor does the mistaken opinion of the legislature as to the legal effect of the passage of the act creating Sandoval county create such vacancy, nor render Sandoval ineligible to hold the office.

Chapter 49, p. 80, Laws 1903, became a law March 13, 1903, or two days after the approval of chapter 27. This latter act amends section 3 of chapter 27 by direct appointment of T. C. Gutierrez and Severo Sanchez county commissioners of Bernalillo county, and provides that, when qualified, the board shall appoint an assessor and a probate judge for Bernalillo county. Section 2 provides for the division of Bernalillo county into commissioner districts. There is no provision in this act declaring the office of assessor of the old county vacant, but simply for the appointment of an assessor. All that had been said, therefore, concerning section 3, c. 27, is equally applicable to this amendatory act. The method of selecting an assessor was changed from an election by the people to appointment by the board of county commissioners. If the people had no legal right to elect an assessor for that county, the board of county commissioners had no legal right to appoint; and, if such appointment was made, there being no vacancy, the appointment was of no legal effect, as the former incumbent, Sandoval, had a superior title to the office by reason of his election, qualification, and possession of the office, and the fact that his term had not expired.

Where districts or counties are divided by legislative enactment, officers required to reside in the district or county in which they were elected have a right to retain their offices by establishing their residence so as to remain in the old county, and a reasonable time is allowed them to do so, even after the taking effect of the act. In the State of Ohio article 3, § 3, of the constitution provided that "there shall be appointed in each county not more than three nor less than two associate judges, who during their continuance in office, shall reside therein." In the case of State of Ohio, etc., v. Choate, 11 Ohio, 513, the question of the effect of county division upon the
57 tenure of office of these judges was under consideration, and in deciding the case the court said: "It is, however, alleged that this rule will enable the legislature at any time, by a general

law, to oust from office, without the form of impeachment and in violation of the spirit of the Constitution, many associate judges and any president judge of this State, by changing the limits of the counties and of the circuits in which they severally reside, so as to place their residence in some other county or circuit. Arguments of this nature, which assume the possibility that a co-ordinate branch of government will wantonly violate its plain duty, *ought to be held* of little weight in a court of justice, where the legal presumption obtains that every legal functionary will faithfully observe the obligations of duty imposed upon him by his oath of office. The General Assembly, if it should ever attempt to violate a measure, as the argument supposes, could not effectually accomplish the object. The judges would in all cases be able to defeat the scheme by a seasonable removal within the newly prescribed limits of his county or circuit. So, in this case, had Choate preferred to retain his office, he could have changed his residence after the passage of the act attaching Milan to the county of Erie. This he neglected to do at the time, neglected to do when the special court was called requiring his official attendance, neglected to do so at the May term of the court, and still neglected up to the 2d day of August." In the case of Norwood v. Holden, 45 Minn. 313, 47 N. W. 971, the court said: "It seems that it was assumed that if the relators had, by reason of the redistricting, become disqualified from taking their seats on the board in January, this created vacancies which the chairman of the boards of town supervisors were authorized to fill. But this was a mistake, for it would not be one of the events the happening of which would create a vacancy, under the provisions of Gen. St. 1878, c. 9, § 2 (Gen. St. 1894, § 892)." In Minnesota at the time this case was decided, the statute provided that a commissioner "shall at the time of his election be a resident of said district, and shall reside therein during his continuance in office." The court held that changing the boundaries of a district after election did not have the effect of disqualifying the officer. State *ex rel.* O'Connell v. Nelson (Wash.) 34 Pac. 562; State v. Swearingen, 12 Ga. 23; State v. George, 23 Fla. 585, 3 South. 81.

It is alleged in the information, and admitted in the answer, that the respondent was appointed on the 23d day of March, 1903, and that he demanded and took possession of the office upon the same day. Section 16 of the act creating Sandoval county provides that the act shall not take effect until the 14th day of April, 1903. Therefore, at the time the respondent was appointed and attempted to take possession of the office, the county of Bernalillo was in the same condition as when the relator was elected, and the county of Sandoval was not in existence. There had been no change of boundaries, and, even if a residence qualification existed, Sandoval resided in the county for which he was elected. Prior to the taking effect of the act creating the new county, thus changing the boundaries of the old, it is untenable to contend that a vacancy existed by reason of the act creating the new county, and that Sandoval was

thereby disqualified from holding the office of assessor of Bernalillo county, to which he had been elected. We are therefore of the opinion that the appointment of the respondent, prior to the taking effect of the act creating the county of Sandoval, was unauthorized and of no effect, even if it were true that the creation of the new county *ipso facto* vacated the offices of all those officers of the old county residing within the boundaries of the new county when created. No vacancy existed in the office of assessor of Bernalillo county, the relator's title to that office remained unimpaired, and the attempt of the respondent to take possession of the office on the 23d of March, 1903, or about 20 days prior to the taking effect of the act creating the new county, was without warrant of law, and was a usurpation in law as against the superior title of the relator, who was the rightful incumbent and in the lawful possession of the office.

Section 3 of the act creating Sandoval county provides for the election of an assessor and three other officers by a vote of the people of Bernalillo county as the same will be constituted after the new county is created; but by the terms of the act this election was to be held on the 14th day of April, 1903, the date upon which the act took effect. It is clear that at the time this act was passed the legislature understood that no vacancy would exist in the office of assessor of the old county prior to the taking effect of the act creating the new county. It is somewhat strange, to say the least, to find the same legislature, two days later, passing an amendatory act (chapter 49, p. 80, Laws 1903) providing for the appointment of an assessor for Bernalillo county by the board of county commissioners thereof on the 10th day of April, 1903, four days prior to the division of that county. To sustain this legislation upon which the appellee relies, it is necessary to hold that the power to remove and appoint county officers is vested exclusively in the legislature, unlimited by act of Congress. Whatever may have been the power of the legislature upon this subject prior thereto, since the enactment of the act of Congress approved July 30, 1886 (24 Stat. 170, c. 818), and the act amendatory thereof, approved July 19, 1888 (25 Stat. 336, c. 679) express limitations have been placed upon the power of the legislature to regulate county affairs, which in our opinion renders
58 the position above stated unmaintainable in this action. We do not deem a discussion of this question necessary to a decision of this case, and as it will necessarily be more fully considered in the decision of the case of Territory, on the relation of Thomas J. Curran *et al.* v. Thomas C. Gutierrez and Severo Sanchez, 78 Pac. 139, which is a companion case involving the validity of the same acts of the legislature under consideration in the present case, we will refrain from any further reference to the subject here.

From the views above expressed it follows that the demurrer to the answer should have been sustained in the court below, and that the court erred in rendering judgment quashing the *quo warranto* proceedings and dismissing the cause.

The judgment of the court below is reversed, and the cause remanded, with directions to reinstate the cause and proceed in accordance with the views expressed herein.

Mills, C. J., concurs. Parker and Pope, JJ., concur in the result. Baker, J., having heard the case below, took no part in this decision, but files herewith reasons in support of decision below. Mann, J., not having heard the argument in this court, did not participate in this decision.

Baker, J., by virtue of section 884, Comp. Laws 1897, files his reasons for his decisions in the district court, which can be best done by quoting his opinion filed in this cause in the district court, which is as follows:

"TERRITORY OF NEW MEXICO:

District Court, Bernalillo County.

"TERRITORY OF NEW MEXICO on the Relation of JESUS M. SANDOVAL
v.
GEORGE F. ALBRIGHT.

"This cause of action is based upon an information by the solicitor general of the Territory against George F. Albright, requiring the said Albright to show by what authority of law he holds the office of assessor of Bernalillo county. For answer to the information the respondent, Albright, says he holds said office by virtue of an appointment by the board of county commissioners of said county, acting under and by virtue of section 3 of an act of the legislature creating Sandoval county, approved March 10, 1903 (Laws 1903, p. 37, c. 27), and the amendment thereof, approved March 12, 1903 (Laws 1903, p. 80, c. 49). Respondent, further answering, says said Jesus M. Sandoval was at the time of the creation of said Sandoval county a resident of the territory comprising said Sandoval county, consequently not a resident of Bernalillo county, and therefore not eligible to hold the office of assessor of said Bernalillo county. To the answer of respondent the solicitor general files a demurrer. The demurrer raises the legality of said section 3, c. 27, p. 38, Sess. Laws N. M. 1903, and said chapter as amended by chapter 49, p. 80, of said Session Laws. Said section 3 of said chapter 27 reads as follows:

"'On or before the first day of April, 1903, the county commissioners of the present county of Bernalillo shall give notice of an election to be held on the fourteenth day of April, 1903, within the county of Bernalillo as the same will be constituted after the passage of this act, for the election of two county commissioners, one probate judge and one assessor, to serve until their successors are elected and qualified at the next general election. Said officers so

named in this section to be at the time of said election actual *bona fide* residents of the said county of Bernalillo as the same shall be constituted after the passage of this act. The returns of said election to be made as the returns of general elections are made.'

"Said amendment contained in said chapter 49 reads as follows:

"'SECTION 1. That section 3 of the act to create the county of Sandoval, approved on March 10, 1903, be and the same is hereby amended to read as follows:

"'"SEC. 3. That T. C. Gutierrez, to fill the unexpired term of the second district, and Severo Sanchez, be and they hereby are appointed and constituted county commissioners for the county of Bernalillo as the same is constituted after the creation of Sandoval county, and said T. C. Gutierrez and Severo Sanchez shall qualify as said county commissioners on or before the fifth day of April, A. D., 1903, and shall, together with the county commissioner now in office for the said county of Bernalillo, hold a meeting not later than the tenth day of April, 1903, and the said three persons as a board of county commissioners for Bernalillo county shall appoint one assessor and one probate judge for the said county of Bernalillo *county* to serve until their successors are elected and qualified at the next general election."'

"Said section 3 of chapter 27 in effect declares vacant the office of assessor of said Bernalillo county by providing for an election of an assessor of said county. To say that it was not the intent and purpose of the legislature in said section 3 to not declare said office vacant, it would have been more than useless for the legislature to have provided for the election to fill said office when there was no vacancy to fill; said office being filled by said Sandoval. Certainly it will not be contended but what the legislature intended to declare the said office of assessor vacant. Whether they had the power so to do is another question. The legislature, construing and acting under section 3 of chapter 27, amended said section 3 as seen by section 1 of chapter 49 of Session Laws of 1903. Therefore it must be conceded that the legislature, when it passed said section 3, intended to declare said office of assessor vacant, and that when it enacted said chapter 49, it so construed the said section 3. To say the legislature did not intend in said section 3 to declare said office vacant is to make the language of said section referring to the
59 election of an assessor meaningless, as well as the provision for the appointment of an assessor by the county commissioners in said section 1.

"The demurrer raised three questions: (1) Had the legislature the power to summarily remove Mr. Sandoval from the office of assessor of Bernalillo county? (2) Had the legislature power to authorize the county commissioners of Bernalillo county to fill such vacancy? (3) Does his nonresidence in Bernalillo county make said Sandoval ineligible to hold said office, or, in other words, is he eligible to be reinstated?

"Section 1857, Rev. St. U. S. 1878, provides: 'All county officers

shall be appointed or elected in such manner as may be provided by the governor and Legislative Assembly of each Territory.' Section 7 of the organic act of the Territory of New Mexico provides 'that the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act.' As well the legislative acts cannot conflict with any of Congress thereafter passed. The provision by the legislature for the removal of county officers is certainly a rightful subject of legislation and is legal, unless prohibited by the Constitution of the United States or some act of Congress.

"It is contended that the act of removing Mr. Sandoval as assessor is in conflict with the fourteenth amendment of the Constitution of the United States, which is as follows: 'No State shall * * * deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' It is contended by the learned counsel for the Solicitor General that Mr. Sandoval had been deprived of his property without due process of law—in other words, Mr. Sandoval's title to the office and its emoluments for the full term of two years was a vested right, which is protected by said fourteenth amendment, unless said Sandoval was removed by a court of competent jurisdiction after having had a fair and impartial trial and a full opportunity to make his defense; and in support of this proposition of law, the learned counsel cites Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. 8, 97, 28 L. Ed. 629.

"Did the Supreme Court of the United States in Kennard v. Louisiana or Foster v. Kansas, *supra*, thus declare the law? In the celebrated Goebel case, entitled Taylor and Marshal v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 44 L. Ed. 1187, quoting from page 571, 178 U. S., page 898, 20 Sup. Ct., 44 L. Ed. 1187: 'So in Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478, concerning the right of Kennard to the office of associate justice of the supreme court of Louisiana, jurisdiction was taken on the ground that the constitutionality of the statute under which the disputed title to office was tried was drawn in question. The court, speaking by Mr. Chief Justice Waite, said: "The question before us is, not whether the court below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guarantied by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.'" The writ in Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. 8, 97, 23 L. Ed. 629, rested on the same ground.

"In each of the foregoing cases the determination of the right to the office in dispute was reposed in the judicial courts, and no question was expressly considered by this court as to whether the right to a public office of a State was or was not protected by the fourteenth amendment. In North Carolina the legislature created the office of

State railroad commissioner. The statute also provided that such 'officer might be suspended by the governor, and his successor appointed by the governor.' In Wilson v. North Carolina, 169 U. S. 593, 18 Sup. Ct. 435, 42 L. Ed. 865, the governor removed, by suspending without a hearing, Mr. Wilson as State railroad commissioner, and appointed one Caldwell to fill the vacancy. Mr. Wilson contended this was in conflict with the fourteenth amendment of the Constitution of the United States. In this case the court said: 'What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the State legislature to determine, having regard to the constitution of the State. The procedure provided by a valid State law for the purpose of changing the incumbent of a State office will not in general involve any question for review by this court.' The court further said: 'No such fundamental rights were involved in the proceedings before the governor. In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely State purposes, and the terms upon which it shall be held by the person filling the office.' The court further said: 'Although an office has been held in North Carolina to be generally and in a certain restricted sense the property of the incumbent, yet in this case the Supreme Court held that the incumbent, in taking the office, holds it subject to the act creating it, which binds him by all its provisions, all of which were held to be valid.'

"In Taylor and Marshall v. Beckham, *supra*, discussing the relation of an officer to the appointing or electing power, the Supreme Court of the United States says: 'In Crenshaw v. United States, 134 U. S. 99, 104, 10 Sup. Ct. 431, 432, 33 L. Ed. 825, Mr. Justice
60 Lamar stated the primary question in the case to be: "Whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him." And he said, speaking for the court: "The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right." Butler v. Pennsylvania, *supra*; Newton v. Commissioners, 100 U. S. 548, 25 L. Ed. 710; Blake v. United States, 103 U. S. 227, 26 L. Ed. 462; and many other cases. The decisions were numerous to the effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property secured by contract, but compensation for services actually rendered. Nor does the fact that the constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right.'

"In Long v. Mayor, 81 N. Y. 426, the court says: 'It is claimed that the act in question shortens the duration of plaintiff's term of office, so that the term declared by statute, in force when he was elected, to be for two years, is made by the act of 1870 (Laws 1870, p. 366, c. 137) a term for five months. We see no legal objection thereto. The office was not created by or regulated in any manner by the constitution. The legislature had entire control over the matter. The office was created, its term was fixed by that body, and it could be changed by it. The law could be amended or repealed, and this was the effect of the provision of the act of 1870. A term ending at a time stated was substituted for a term limited to two years. The original term was thus shortened. The legislation was aimed at the office, not the incumbent. But, however viewed, the act complained of was within the lawful exercise of power by the legislature, and within the principle, frequently reiterated by the courts of this State, that a public office is not a grant, and the right to it does not depend upon or partake of the nature of a contract. Connor v. Mayor, 2 Sandf. 355, 369, affirmed 5 N. Y. 285; Smith v. Mayor, 37 N. Y. 518.' In State *ex rel.* Attorney General *et al.* v. Davis, 44 Mo. 129, the court says: 'In England offices are considered incorporal hereditaments, granted by the crown, and a subject of vested or private interests. Not so in American States. They are not held by grant or contract, nor has any person a private property or vested interest in them'—citing a long list of cases.

"The proposition that a public office created by legislative enactment is not a vested right is well settled. Taylor v. Beckham, *supra;* Wilson v. North Carolina, *supra;* Butler v. Pennsylvania, 10 How. 402, 13 L. Ed. 472; State v. Davis, *supra;* note in Hoke v. Henderson, 25 Am. Dec. 701; People v. Squires, 14 Cal. 12. This last citation is strikingly in point. It in effect removes one officer and puts another person in his place, to continue in that office and to receive its emoluments, without a hearing and without being permitted to offer any defense. State v. Douglass, 7 Am. Dec. 87 and note; Denver v. Hobart, 10 Nev. 30; People v. Haskell, 5 Cal. 357; People v. Hurlbut, 24 Mich. 44, 9 Am. Dec. 103; Conner v. The Mayor, 5 N. Y. 285. In the last case the court said: 'Where an office is created by a legislature, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may even be taken away without abolishing the office. Such extreme legislation is not to be deemed probable in any case. But we are not discussing the legislative power, nor its expediency or propriety. Having the power, the legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference.' In Territory v. Van Gaskin, 6 Pac. 30, the legislature of the Territory of Montana enacted the following law: 'That the offices of county commissioners of the county of Custer be, and the said offices are, hereby declared to be vacant, and no official duty shall be performed by the persons constituting the present board of county commissioners, ex-

cept to make reports; * * * and that William Van Gaskin, George M. Miles, and Thomas J. Ryan are hereby appointed commissioners of Custer county.' The court in this case said: 'By the enactment of the law appointing the respondents to the office declared vacant, until the commissioners thereafter to be elected assumed the duties of their office, the governor and the Legislative Assembly acted within the limits of the act of Congress, which required that the county officers should be appointed or elected in such manner as they might provide. The governor and Legislative Assembly have the power to provide the manner of the appointment. Therefore they had the power to appoint directly.'

"The foregoing citations and quotations settle the proposition that a public office is neither property, nor in the nature of property, nor a private, vested right, that is protected by the fourteenth amendment of the Constitution of the United States. There are a number of authorities that hold differently. The States of Florida, Georgia, and North Carolina very pointedly and conclusively are in conflict with the line of authorities herein cited. The courts of the Territories are bound by the decision of the Supreme Court of the United States. Even if it were a fact, which I do not admit by any
61 means, that the reasoning, as well as the justice, would be on the side of the holdings of the States of Georgia, Florida, North Carolina, and some others, still I would be bound to follow the decisions of the Supreme Court of the United States, and in the language of Sandford, J., in Conner v. Mayor, *supra*: 'We are now discussing the legislative power, not its expediency or propriety. Having the power, the legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference.' I am of the opinion that the legislature has the power to terminate the tenure of any officer holding an office created by the legislature. Therefore the legislature had the power to remove or legislate Mr. Sandoval out of the office of assessor of Bernalillo county, and in so doing they did not act derogatorily to, nor was their legislation in conflict with, the fourteenth amendment of the Constitution of the United States, as contended by the learned counsel for the Solicitor General.

"This brings us to the second proposition: Had the legislature power to fill the vacancy caused by the removal of Mr. Sandoval? This question was by me decided in the case of Territory *ex rel.* Curran *et al.* v. Gutierrez *et al.*, 78 Pac. 139. It was contended in that case by the learned counsel for the Solicitor General, as it is also in this case, that it required a general law to fill vacancies; otherwise, such act of the legislature would be in conflict and therefore prohibited by the last paragraph of the act of Congress commonly called the "Springer act" (act July 30, 1886, c. 818; 24 Stat. 170), which reads as follows: 'In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the territorial legislature thereof.' This case is one which belongs to the 'in all other cases,'

"It is also contended that the legislature (section 1, c. 2, p. 18, Laws N. M. 1901) by general law fixed the manner of filling vacancies in county offices, and therefore that this law is in conflict with the said section 1, as well as in conflict with said paragraph of the Springer act. It certainly could not successfully be contended that, if the legislature had passed a law that the legislature should fill all vacancies occurring in county offices, it would have been in conflict with said paragraph of the Springer act, for the reason that it would be a general law. Did not the supreme court of Montana, in Territory v. Van Gaskin, *supra*, speak wisely when it said: 'The governor and Legislative Assembly have the power to provide the manner of appointment. Therefore they had the power to appoint directly.' Section 1857 of the Compiled Laws of the United States, *supra*, provides 'that county officers shall be appointed or elected in such manner as may be provided by the governor and the Legislative Assembly.' Did they not in this case provide the manner the office of assessor of Bernalillo county should be filled? Would it not seem a little absurd for the legislature, in which all power is conferred by Congress, to say in what manner county officers shall be appointed or elected, to spread upon its statute books an act saying the legislature may fill county offices or vacancies, when the power already rests with it? Would it not be like unto a man getting permission or authority from himself to do or not to do a specific thing, which was his duty to do or not to do?

"In Territory *ex rel.* Smith v. Scott *et al.* (Dak.) 20 N. W. 401, the question of the legislature delegating its appointive power to others was squarely raised. The court said: 'The act of the territorial legislature passed March 8, 1883 (Acts 1883, p. 217, c. 104), removing the seat of the government of the Territory from Yankton, and authorizing certain persons therein named as commissioners to select some other city as the capital and locate the seat of government at the place so selected, is not in conflict with the organic act of the Territory, in that it delegates to such commissioners a duty that could only be lawfully performed by the governor and the Legislative Assembly; nor in that it appoints and designates such commissioners, instead of leaving their appointment to the governor, by and with the advice and consent of the legislative council, upon his nomination, and such commissioners are lawfully entitled to exercise the duties and powers conferred upon them by such act.'

"In the case of Waterman v. Freeman, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, the constitution of California is construed, which reads as follows: 'All officers or commissioners whose election or appointment is not provided for by this constitution and all officers or commissioners whose offices or duties may hereafter be created by law shall be elected by the people or appointed as the legislature may direct.' This language is so strikingly like the provisions in section 1857 of the Compiled Laws, *supra*, that a construction of the California constitution would certainly be of great assistance and throw considerable light upon the construction of said

section 1857. The office under consideration in this case was one created by statute, and it was filled by the legislature acting directly, without having passed any general law, or any other provision other than simply the assembly appointing the officer. A comparison of the two provisions are so strikingly similar that, if the legislative assembly of California could fill an office under that provision, then certainly, by the same course of reasoning, the territorial assembly could fill such offices as contemplated by said section 1857. In other words, they maintained, as well as many other authorities, and certainly it is the opinion of the court in this case, that the power to create an office implies the power to fill such office. It would be folly to grant the power to create
62 with no means provided for the filling of such offices. It is true there is no expressed power granted by Congress to the Territory to fill vacancies in office. But certainly we have a right to assume that no one will contend but what there is a power somewhere to fill a vacancy in an office that has been created by the legislative power of the Territory and the office once legally filled. It must be conceded that all power we have in the Territory to create county offices and to provide the manner in which such offices shall be filled, either by appointment or by election, is embodied in the one section of the act of Congress (section 1857, *supra*). Therefore the legislative power must provide first the office and then the officer, through an election or appointment in the manner provided by the legislature. All the authority the Territory has conferred upon it to fill vacancies in office is implied in the general power given the legislative power as contained in said section 1857. Therefore the legislative power is authorized to fill vacancies. The manner of filling them is left to the legislature to provide. And if it can provide a manner, such manner may be by direct appointment. It may be conferred upon the people to elect. It may be conferred upon the governor to appoint, or it may be conferred upon county commissioners to appoint, as in this case.

"It is contended by the learned counsel representing the solicitor general that chapter 2, p. 18, of the Laws of New Mexico of 1901, precludes the legislature from filling vacancies, either by direct appointment or by appointing a commission to fill vacancies in county offices. It will be observed that said provision provides that the governor shall appoint when a vacancy shall occur 'by reason of death, resignation, or otherwise.' The vacancy in the office of assessor of Bernalillo county was not caused by death, nor resignation. How about the term 'otherwise'? Does that include a vacancy caused by legislative removal? Is it to be taken in its broad sense, so as to include any and all vacancies not caused by death or resignation? We might inquire why the legislative power delegated to the governor the authority to fill vacancies at all. Certainly the legislature would not have delegated such power, had there been a vacancy occurring while the legislature was in session. The session of the legislature being limited by law to 60 days, that

leaves the balance of two years in which no vacancy could be filled, unless such power to fill had been delegated to some person or persons. If no provision had been made by the legislative power to fill vacancies, could they have been filled? Yes; by the legislative power, and by it only. If the legislature intended that any vacancy that might occur shall be filled by appointment by the governor, why should it specifically point out vacancies caused by death or resignation? It would be a serious charge against the legislative intelligence that it meant any vacancy that might occur shall be filled by appointment by the governor, after employing the language they did. If the word 'otherwise' is to be construed to mean any vacancy, then the words 'by reason of death or resignaiion' were surplusage, and must stand for naught, because they are included in the words 'any vacancy.'

"We believe it to be a universal rule of construction that, when general words follow particular and specific words, the general words are confined in meaning to the things of like kind and nature designated by the specific words. Sutherland on Stat. Con. § 286; Jensen v. State (Wis.) 19 N. W. 378; State v. Dennison (Neb.) 82 N. W. 385; Roberts v. Jackson's Heirs, 4 Yerg. (Tenn.) 322; State v. Wood County, 72 Wis. 637, 40 N. W. 381. In each of these cases the word 'otherwise' followed specific terms, and was construed to mean other things of like kind and nature. In the case of State v. Wood County, *supra*, the Wisconsin statute provided, referring to county road tax, 'which shall be expended under their (county board) direction, in making culverts, grading, graveling, ditching, or otherwise improving such highways.' The court said: 'By a familiar rule of construction, the words "or otherwise improving such highways," must be held to mean the improvement of such highways by making culverts, grading, graveling, ditching, or other improvements of a similar character, and not to the building of a bridge.' In Jensen v. State, *supra*, the statute provided: 'If any tavern keeper, or other person, shall sell, give away, or barter any intoxicating liquors,' etc. The court construed the words 'other person' to mean, not anybody and everybody, but 'following the words "tavern keeper," indicate very clearly the class of persons against whom the act was aimed, and the general words "other persons" must, under the familiar rule "*noscitur a sociis*," be taken to mean a similar class of persons, and not to be extended so as to include all persons.' And the court cites a long list of authorities in support of their construction. In the Nebraska case the law provided: 'If any person shall open or establish, as owner or otherwise, any lottery or game of chance in this State,' etc. In construing the term 'otherwise,' as used in this connection, following the word 'owner,' it was restricted to the meaning of 'owner,' or some one in similar or like capacity.

"We do not hesitate to say that, wherever the word 'otherwise' is used, following specific terms, no authority can be found that will give it its broad significance when used by itself, but that they restrict it to the meaning of the specific words and terms preceding it.

Apply that rule of construction to the said chapter 2, and what is the meaning of the word 'otherwise' following the words 'whenever any vacancy shall occur by reason of death, resignation, or otherwise'? You will have the word 'otherwise' meaning
63 a vacancy caused by death or resignation, or vacancies caused in a similar manner; possibly, instead of death, dementia. For example: Instead of resignation a man picks up and hies to other countries. He has not resigned. He has not been removed, but he has quit, and it is of similar kind and character as 'resignation.' And again, by implication at least, the legislature has interpreted said chapter 2 by enacting section 1 of chapter 49. A legislative interpretation of a statute is not binding upon a court, but should have great weight. Jackson v. Board of Supervisors, 34 Neb. 680, 52 N. W. 169; Coutant v. People, 11 Wend. 511. I am therefore of the opinion that the acts of the legislature, viz., section 3 of chapter 27, and section 1 of chapter 49, are legal, and that the legislature acted within its scope and power.

"The other question raised by the demurrer, to wit, whether or not Sandoval's non-residence of the present territory of the county of Bernalillo makes him ineligible to be reinstated as assessor of Bernalillo county, is not necessary for me to pass upon in this action, for the reason heretofore given as to the legality of the statute passed by the last legislature. For the reasons hereinbefore given, the demurrer is overruled, and, should the solicitor general stand upon his demurrer, the information will be dismissed."

And heretofore, on to wit, on the 24th day of February A. D., 1904, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an opinion by the court in the cause No. 1064, above entitled, which said opinion was and is in words and figures following, to wit:

64 In the Supreme Court of the Territory of New Mexico, January Term, A. D., 1905.

GEORGE F. ALBRIGHT, Plaintiff in Error, vs. TERRITORY OF NEW MEXICO *ex Rel.* Jesus Ma. Sandoval, Defendant in Error.	No. 1064. Error to District Court, Bernalillo County.

Syllabus.

1. The statute of 9 Anne, which provides for judgment of ouster, fine and costs against the respondent upon an information in the nature of *quo warranto*, is a part of the common law of this Territory.
2. Under that statute the expiration of the term of office involved, pending the determination of the cause, does not work a dismissal of the writ of error from a judgment of ouster.

3. The judgment of the court below, in so far as it adjudged ouster against the respondent, was in accordance with the law of this case as declared upon the former appeal. Territory *ex rel.*, Sandoval v. Albright, 78 Pac. 207.
4. The purpose of *quo warranto* proceeding at common law, and in this Territory, is to oust the respondent from an office which he is alleged to hold unlawful- and not to install the relator or any person into such office.
5. The judgment of the court below, in so far as it ordered the respondent to deliver the books and other articles pertaining to the office envolved "to relator" * * * "as the lawful custodian thereof", was erronious as being beyond the scope of a *quo warranto* proceeding.
6. The remedy for the improper refusal of an appeal or supercedeas is by mandamus and not by error. Gutierrez vs. Territory *ex rel.*, Curran (decided January 25th, 1905).

65 Opinion of the Court.

POPE, *J.*:

This case was considered by this court upon the former appeal, Territory vs. Albright, 78 Pac. (N. M.), 205, when the cause was reversed and remanded with directions to reinstate and for further proceedings in accordance with the opinion of the court. Upon presentation of the mandate to the court below, the relator Sandoval, moved the court to enter final judgment of ouster and for costs, which motion the court denied, but ordered the cause reinstated, vacated the judgment formerly entered in favor of the respondent Albright, and sustained the demurrer of the relator to respondent's answer, with leave to the respondent to file an amended answer. This was done by respondent and relator thereupon moved for judgment on the pleadings, which motion was sustained and final judgment entered declaring the respondent not entitled to the office in controversy and adjudging costs in favor of the relator. Respondent thereupon prayed an appeal and supercedeas, each of which being denied, a writ of error was sued out in this court.

Preliminary to the consideration of the case upon its merits, there are two motions for determination. The first of these is the motion to quash the writ of supercedeas, heretofore granted by this court. The functions of that writ are co-extensive simply with the duration of the present appeal, and expire with it. As the effect of the disposition to be presently made of the main case is to determine the *supercedeas* as effectually as if the writ were now quashed, we find it unnecessary to determine this motion or to re-examine the grounds upon which the writ -as originally granted.

The second motion interposed is for the dismissal of the writ of error upon the ground that the term of office of the respondent has expired and that there is now nothing upon which the judgment of this court, in case of a reversal could operate. In support of this

motion there have been cited a number of cases from the Su-
66 preme Court of the United States which hold generally that, an appeal will be dismissed whenever it is evident that the decision rendered, will have nothing upon which it can operate and will be in effect a mere moot decision. California v. San Pablo, etc. R. R., 149 U. S. 314; Mills v. Green, 159 U. S. 651. It is also urged that in Kimball vs. Kimball, 174 U. S. 163, it was held that the appeal will be dismissed under such circumstances, notwithstanding the fact that the adjudication left standing by the dismissal will be of great importance in the determination of the other controversies in which one of the parties may be interested. We are not disposed to question the correctness of the rule established by those cases, but we are of the opinion that they have no application to the case here presented. At common law as well as under the statutes of Anne, the judgment rendered upon *quo warranto* informations was that of ouster, if the respondent should be found guilty of usurpation, with costs and sometimes a nominal fine (High. Ex. Leg. Rem. sec. 752), although the fine has usually been omitted under the American practice. (State Bank v. State, 1 Blackf. 267; State v. Brown, 5 R. I. 1.) From a very early date it has been held that at common law the cessation of the uruspation before judgment did not terminate the proceeding. In King v. Williams, 1 W. Bl. 93, decided in 1757, it was held that there should be a judgment of ouster though the uruspation was not continued to the trial. As is said in High on Extraordinary Legal Remedies, sec. 754: "As regards the judgment of ouster at common law, it is to be observed, that it is not at all dependant whether the respondent does or does not claim a right to exercise the office or franchise in controversy; the question being whether he has done any act *act* which necessarily implies a claim to its exercise. And if such an act can be shown, judgment of ouster will be given notwithstanding the uruspation has ceased before the trial. (Citing Rex. vs. Williams, 1 W. Black. '93.) So where
67 a statute gives the prevailing party in proceedings upon a *quo warranto* information the right to costs absolutely, the court will give judgment of ouster, notwithstanding the information is entirely fruitless, the term of office having long since expired. (Citing People vs. Loomis, 8 Wend. 396.) And the fact that the respondent's term of office has expired pending the proceedings will not prevent judgment of ouster against him. (Citing Hammer v. State, 44 N. J. L. 667.)

We have examined the case cited in the text just quoted, and we find that they, and indeed, generally speaking, the best considered American cases all hold that the expiration of the term constitutes no reason for dismissal. A few of this cases will be noted. In Hunter vs. Chandler, 45 Mo. 452, it is said: "Information in the nature of *quo warranto* to try the right to a public office may be tried after the term has expired or the officer holding has resigned if the information was filed or proceedings begun before the resignation took place or the term has expired."

So in People vs. Hartman, 12 Mich. 508, it is said: "An information to try the right to a public office will not be dismissed on the ground that the office has expired since information filed. To oust the incumbent is not the sole object of the proceeding, but under the statute, if he is found guilty of the intrusion, a fine may be imposed, and costs recovered; and if the relator claims the office and is found entitled to it he may recover damages.

And in People v. Rogers, 118 Cal. 394, it is said: "Under the statute governing the subject the removal of the usurper, is not the sole object which is or may be accomplished by the proceeding; judgment may be rendered upon the right of the defendant, and also upon the right of the party, if any alleged to be entitled to the office; if against the defendant he must pay the costs and at the court's discretion a fine; it is also the foundation of a recovery by the rightful claimant of damages occasioned by the
68 usurpation (Code Civil Pro., 805, 807, 809). When, as in this instance the action has been brought during the usurpation and such concequences may flow from the judgment, it ought not to be held that the action must abate merely the cause *effelux* of time or other circumstance which does not toll the legal wrong of the intrusion, has put a period to the disputed term. And to this effect is the decided preponderance of authority (citing People vs. Hartwell, 12 Mich. 508; State v. Pierce, 35 Wis. 93; Hunt v. Chandler, 45 Mo. 452; People v. Loomis, 8 Wend. 396; Com. v. Jackson, 45 Pa. St. 49). Some cases cited by appellant—to which may be added Herd v. Beck (Kans.) 45 Pac. 92—are distinguishable; they proceed on the assumption that after the expiration of the usurped term no substantial right was involved."

So, in Wisconsin, where the statute is practically the same as the California statute, it is held (State v. Pierce, 35 Wis. 93) that the cause may be prosecuted to final judgment after the expiration of the term as a fine and costs may be imposed and damages recovered thereafter. In Com. v. Swasey, 133 Mass. 538, it was said:—"The term of office of Mr. Mackie, has expired since the argument in this court, but it is not the purpose of an information in the nature of a *quo warranto* to put any person into office but to determine by what warrant the defendant holds the office which he assumes to hold. There must, therefore, be judgment, against the defendant of ouster from the office of city physician under the appointment made by the mayor and aldermen of the city of New Bedford, in February 3rd, 1880."

So in Nebraska (Dean v. State, 56 Neb. 302), it is said:

"Of the questions discussed, that naturally first presenting itself for decision is whether this court will review the proceedings of the district court at this time, it appearing that the term of office in controversy has expired. It is insisted that the case there-
69 fore falls within the rule fowll-ed by many courts, that where no effective judgment can be rendered except for costs, a case will be denied further consideration. This was not a proceeding

by the public prosecutor to oust an usurper, but one by a rival claimant to the office, a judgment in which would be necessary to adjudicate the title to the office as between the parties. We must assume that the office in dispute is a lucrative office. * * * An adjudication of the title in the proper proceeding is essential to establish the rights of the parties to the emoluments. This is a property right and cannot be denied because the delay occasioned by the crowded condition of our docket has rendered the active part of the judgment ineffective."

In Hammer v. State, 44 N. J. L. 671, it is held, citing numerous English cases, that the law is well settled that though the usurpation be not continued to the trial, there should be judgment of ouster. In the much cited case of People v. Loomes 8 Wend. 396, it is said: "The remedy must be entirely fruitless in this case, as the term of office of the defendants has long enough expired. If application has been made for the *quo warranto* we should have denied it as it was done in People v. Sweeting, (2 Johns. R. 184) although judgment of ouster will be unavailing and the damages, if a suggestion be made, must be very trifling, still I am of opinion we cannot suspend the judgment as the revised statutes are imperative and give to the prevailing parties costs."

In the case of Commonwealth v. Smith, 45 Pa. St. 60 it is said by the court through Mr. Justice Woodward: "I have no doubt that *quo warranto* brought within the term of an office, may be well tried after the term has expired." A number of these decisions are from the States which like ourselves have no statutory provisions as to *quo warranto* and thus squarely in point. While it is true that in some of the other cases above cited (among them those from California, Wisconsin, Missouri and New Jersey), there were statutes involved which provide for the recovery of a fine and
70 costs upon *quo warranto*, and in at least the States of California and Wisconsin, these statutes go further and provide that upon judgment rendered the relator may recover by action the damages which he may have sustained by reason of the usurpation of the office by the defendant, we do not consider these matters as rendering the cases inapplicable as authority in a case arising in this Territory. So far as the fine and costs are concerned, that is in terms provided for by the statute of 9 Anne ch. 20, sec. 5 (A. D. 1710), which provides that in the case of any person adjudged guilty of usurpation "it shall and may be lawful to and for the said courts respectively, as well to give judgment of ouster against such person or persons, of and from any of the said office- or franchises, as to fine such person or persons respectively, for his or their usurping, intruding into or unlawfully holding and executing any of the said offices and franchises; and also it shall and may be lawful to and for the said courts, respectively, to give judgment that the relator or relators, in such information named, shall recover his or their costs of such prosecution; and if judgment shall be given for the defendants, in such information, he or they for whom such judgment shall

be given shall recover his or their costs therein expended against such relator or relators; such costs to be levied in manner aforesaid." High's Ex. Leg. Rem. p. 764. This statute is a part of the common law of this Territory (Territory v. Ashenfelter, 4 N. M. 9), and as it has not been modified by statute in any respect it is still the law in this jurisdiction that the court may impose a fine and costs upon an information of the character here presented. While it is true that the American courts have not as a rule exercised the power to fine conferred by the statute of Anne (Morris v. Underwood, 19 Ga., 559), and while the court below did not in this instance exercise that power, this does not detract from the fact that that power is possessed (State Bank v. State, 1 Black
267; State v. Brown, 5 R. I. 1), and that were this cause
71 reversed and remanded for a new trial it might be within the
power of the court to impose such a fine. We thus find that the statutory provisions as to fine and costs existing in some of the States above cited, do not distinguish the cases of those jurisdictions for the reason that in this jurisdiction, as well as there, exists the liability to such fine and costs. How far the judgment in this proceeding is independent of the statute such as exists in California and Wisconsin, available as a basis for an action for the emoluments of the office involved, we need not now determine. We note, however, that the defendant in error contends that "the judgment rendered by the district court will affect the rights of the parties in another litigation with reference to the emoluments of the office." If his position as to this be correct, then his motion is met by all of the cases above cited, which hold that when the effect of the judgment is to establish the basis of a suit, to recover emoluments, the action continues. Otherwise it would be within the power of the usurper of an office, by resignation, pending the suit, to evade all liability; or by dilatory tactics and by availing himself of the law's delays to prolong the duration of almost every suit of this kind beyond the term of office involved and thus to come free of costs fine or damages, however flagrant, may have been his usurpation. The possibilities of this result are more than remote when it is recalled that many terms of office are only one or two years in duration, and that in the ordinary administration of justice, it often takes fully that length — time to secure from the court of final resort a decision upon the merits of the controversy. We do not believe it to be the law that a litigant can thus speculate upon the chances of a trial of his case and by delaying the hearing of the cause a sufficient length of time to accomplish the result which could never be obtained by a trial upon the merits. For the reasons above stated we consider the cases
just cited as stating the law applicable in this jurisdiction;
72 and this notwithstanding the fact that in some instances there
were local statutes, whereas we have none on this subject. In reaching this conclusion we have not overlooked the fact that there are cases which declare the rule to be as contended for by the defendant in error. In our judgment, however, these cases are not

as well considered as those from the jurisdictions above quoted. Thus, State v. Tudor, 5 Day (Conn.) 335, while apperently holding contrary to the conclusion herein reached, cites no cases except People v. Sweting, 2 Johns., 184. The latter case, as pointed out in the most recent case of People vs. Loomis 8 Wend. 396, *supra*, was one where the *application* was made after the term of office had expired. The Loomis case, however, expressly decides, as we have seen above, that a pending proceeding will not be dismissed because the term has expired. So in Churhill v. Walker, 69 Ga. 681, the court, while intimating that an appeal should under such circumstances be dismissed declined to dismiss*ed* that appeal although the term had expired, and proceeded to determine the case on its merits. In Homes v. Sikes, 113 Ga. 582, the question was not as to the right to continue a proceeding where the term had expired, pending the litigation, but as to the disposition to be made of the matter where there was no one occupying or claiming the office at the time of the filing of the information. So in State vs. Powell, 101 Iowa 388, it was held that the cause could not be prosecuted as the term of office had expired, but this was upon the express ground that such judgment could not "be of any avail to the relator," and that "there was no money consideration involved," citing Searing vs. Berry 58 Iowa 20. In this latter case it was said:—"No fees attached to the office of sub-director and hence neither party had any thing to give or lose by further litigation. Courts are not organized for the purpose of determining mere abstractions. The inapplicability of this decision will be recognized when it is recalled that the office here involved unlike that there in contro-
73 versy, is a highly lucrative one. So in State v. Jacobs, 17 Ohio, 153, the court, while holding that the proceeding could not be maintained after the expiration of the term of office, refers to no States in support of its position except New York and Massachusetts, which, as we have seen, from People v. Loomis, 8 Wend., 396, and Com. v. Swasey, 133 Mass., 538, *supra*, have decided to the very contrary; and in the Jacobs case it is conceded, that "in England, it seems not to be considered necessary that the person should continue to hold the office at the time of applying for the information." This rule in the Jacobs case, seems, however, not to have been consistently adheared to even in Ohio, for in the latter case of Hettrick v. Wilson, 12 O. S., 136, the cause was reversed at defenda-t's costs, but in view of the fact that he had *seized* to exercise the office in question, the reversal was without judgment of ouster. We believe that most of the cases which have been relied upon as sustaining the position of respondent will be found upon close examination to be distinguishable, or hastely considered and that the great weight of authority both in England and in this country, is as we have here decided. The motion to dismiss will be accordingly overruled.

Coming now to a consideration of the main case we find that the errors assigned, are *first* that the court erred in sustaining relator's motion for judgment on the pleadings; *second*, in rendering judgment upon the pleadings; *third*, in entering as a part of said judg-

ment a provision that respondent "forthwith deliver up to the relator, the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico as the lawful custodian thereof;" *fourth*, that the court erred in refusing an appeal and supercedeas. As to the first and second of these grounds we are of opinion that the action of the court in this respect very strictly followed the holding of this case on the former appeal. The only change which the plaintiff in error claims to have made in the plead-
74 ing is the allegation that relator was not and never had been a resident of the territory now constituting the county of Bernalillo. The original answer however, upon which the former appeal was decided very fully alleges these facts and the opinion of the court discusses this very point and holds upon it advers-ly to the respondent. Territory vs. Albright, (N. M.) 78 Pac. 207. We hold therefore that this raises no new questions but that we are bound by our former decisions on this point. The third ground of error is alleged a more serious one. The *incertain* in the judgment of the paragraph directing the respondent forthwith to deliver up to the relator the records, books, papers, and other things appertaining to his office, was in effect an adjudication of the rights of the relator and went beyond what in our judgment is the scope of a *quo warranto* proceeding under the laws of this Territory. At common law, in proceedings of this character, the respondent's title to the office was the sole issue to be tried, and the relator's title was not in issue and was immaterial, except so far as it might be necessary to show that he has sufficient interest to maintain the proceedings, while, of course, in many cases the relator's title is incidentally considered in determining the respondent's title, still the adjudication does not operate to reinstate him in office. If after having succeeded in ousting the incumbent, the relator is not voluntar-y admitted to the office he must resort to mandamus to secure possession. Strong, petitioner 20 Pic. 497; Prince v. Skillin, 71 Main, 366; People v. Londoner, 13 Colo. 303; State v. Meek, 129 Mo. 431; Homes v. Sikes, 113 Ga. 583. The matter is very th-roughly discussed in the case of State v. Vail, 53 Mo. 109, where it is said: "The question raised by either form of proceeding *i. e.* by the State or by the attorney general on the relation of some private person, is whether the defendant is usurping an office whether he is exercising functions rightfully or without warrant of law. It is not whether the relator or any one else is *de jury* entitle- to it. There is no doubt decisions of the States which maintain that when the relator is the person claiming the office, his right to the office will be examined and determined, thus treating the pro-
75 ceedings as an ordinary action at law between plaintiff and defendant, the relator occupying the position of plaintiff, and, of course, having on him the burden of proof. But in such cases the departure from the common law rules and from the practice under the statute of Anne is so apparent that it is probably this statute *is* not in force when such opinions prevail- or if re-enacted it must be with

material modifications. Our statute, which is in most respects a litteral copy of the statute of Anne, has adopted the English construction and practice and authorizes a judgment of ouster and a fine but only authorizes a judgment for the relator for costs." The court proceeds as follows:—"Neither here nor under the statute of Anne is the relator necessarily a claimant of the office alleged to be usurped by the defendant. The information is filed by the proper officer at the relation of any person desiring to prosecute the same; whether the relator is the proper person and will be allowed to file such a proceeding is a preliminary inquiry of the court, and on that inquiry, whether made before or after the information is filed, the court will ascertain what interest the relator has in the information. It is well settled in England, that the relator, though not necessarily a claimant of the office must have a special interest in the matter of inquiry. * * * But a slight interest will obviate this objection. (Citing Takered, p. 45) * * * In informations on the relation of persons claiming the office, the court can give no judgment for the relator except so far as costs are concerned, and the relator's title is not necessarily examined into except so far as it may incidentally affect the right of the defendant."

We are of opinion that the court below in ordering the respondent to deliver up to the relator the records and other equipments of the assessor's office added to his judgment in *quo warranto* what would properly have been a judgment on mandamus, had the respondent after the judgment in *quo warranto* refuse- to deliver the office
76 While, as suggested by relator, the error is one which in a certain sence can do the respondent no harm, since being not entitled to the office himself it cannot be material to him who has it, still the effect of the clause in the judgment is to adjudicate something which was not within the issues and the point being made we feel that a proper disposition of the matter is, without remanding the case to modify the judgment below by striking out the words "and that he forthwith deliver up to the relator, the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico as the lawful custodian thereof." We find it unnecessary to consider the fourth assignment of error further than to say that we have at the present term held in Gutierrez vs. Territory (decided January 25th, 1905,) that the remedy for the improper refusal of an appeal or supercedeas is by mandamus and not by error.

The judgment of the court below is modified in the respect hereinbefore pointed out and as thus modified is in all respects affirmed.

WM. H. POPE,
Associate Justice.

We concur:

WILLIAM J. MILLS, C. J.
JOHN R. McFIE, A. J.
FRANK W. PARKER, A. J.
EDWARD A. MANN, A. J.

Abbott, A. J., not having heard the argument took — part in this decision.

77 TERRITORY OF NEW MEXICO, Supreme Court, } ss.:

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing 76 pages contain a full, true and perfect transcript of the record and proceedings, pleadings and opinions filed in the case of The Territory of New Mexico *ex rel.* Jesus Ma. Sandoval, appellant versus George F. Albright appellee, numbered 1022 and in the case of George F. Albright, plaintiff in error, vs. The Territory of New Mexico, *ex rel.* Jesus Ma. Sandoval defendant in error, numbered 1064 as the same appear of record and on file in my office, which is hereby transmitted to the Supreme Court of the United States in accordance with an appeal granted by this court in cause No. 1064.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this the 2nd day of April, A. D., 1905.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of N. M.

Endorsed on cover: File No. 19,712. New Mexico Territory supreme court. Term No. 229. George F. Albright, appellant, vs. The Territory of New Mexico *ex rel.* Jesus M. Sandoval. Filed April 17", 1905. File No. 19,712.

FILE COPY.

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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905.

GEORGE F. ALBRIGHT, *Appellant,*
vs.
THE TERRITORY OF NEW MEXICO,
ex rel. JESUS M. SANDOVAL.
No. 229.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF APPELLANT ON MOTION TO DISMISS APPEAL.

WM. B. CHILDERS,
Attorney for Appellant.

CITIZEN PRESS, ALBUQUERQUE, N. M.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

GEORGE F. ALBRIGHT, *Appellant*,
vs.
THE TERRITORY OF NEW MEXICO,
ex rel. JESUS M. SANDOVAL.
No. 229.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF APPELLANT ON MOTION TO DISMISS APPEAL.

WM. B. CHILDERS,
Attorney for Appellant.

STATEMENT OF THE CASE.

The appellant, George F. Albright, was appointed to the office of assessor of the County of Bernalillo on the 27th day of March, 1903, to hold said office until the first day of January, 1905. Proceedings were brought against him by the relator, claiming to have been elected to said office at the regular election held on the 4th day of November, 1902. (*Transcript, page*

3). Judgment was rendered in the district court in favor of the appellant, Albright, and an appeal was taken to the supreme court of the territory, and on the 13th day of September, 1904, the said judgment was reversed, and on the 17th day of October, 1904, a mandate was issued from the supreme court of the territory to the district court, commanding the court to reinstate said cause and proceed in accordance with the views of the court expressed in the opinion of the court on file. This opinion is found in the *record, pages* 38 *to* 45 *inclusive,* and also in 78 *Pacific Reporter* 204. The opinion of the district court, the court below, is found on *pages* 45 *to* 54 *inclusive,* but it is not material for the purposes of this motion.

Upon the mandate being filed in the court below, a rehearing upon said cause resulted in a judgment against the respondent and appellant, ousting him from his office and awarding the office to the relator. (*Trans. p.* 20, *folios* 32-33.) From that judgment a writ of error was sued out by the appellant to the supreme court of the territory. Thereupon said cause was heard before the supreme court upon a motion of the defendant in error to affirm or dismiss and to quash the supersedeas therein, and also upon the merits of the cause. Upon said hearing the supreme court overruled said motions to dismiss the writ of error and to quash the supersedeas and modified the judgment of the court below by striking out of the same the words, "And that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the County of Bernalillo and Territory of New Mexico, as the lawful custodian thereof," and otherwise affirmed said judgment (*Trans. p.* 23, *folio* 36).

From this judgment of affirmance, the appellant has sued out his appeal. The appellee did not appeal from the action of the court overruling his motion to dismiss the writ of error and quash the supersedeas.

I.

The territorial supreme court in its opinion upon the second hearing of said cause considered quite fully the question raised by the appellee upon this motion to dismiss. We do not agree entirely with appellee's statement of the grounds upon which the supreme court of the territory placed its action in refusing to dismiss the writ of error and quash the supersedeas. We are, however, concerned here only with the question of the refusal to dismiss the writ of error. The opinion of the supreme court, which is found on *pages* 55 62, *inclusive, of the transcript,* and also in 79 *Pacific Reporter* 719, is so full and complete that we might content ourselves with resting on that opinion so far as it fully discusses the authorities on the subject of the right to have a review of the judgment on appeal after the expiration of the term of office involved in the proceeding in *quo warranto.* The court does not expressly and exclusively place its refusal to dismiss the writ of error upon the ground that the statute of 9th Anne, being a part of the common law of New Mexico, authorizes the imposition of a fine against one who usurps an office or franchise; nor upon the second ground suggested, that the judgment in the case might affect the rights of the parties in another litigation—although those would have been sufficient ground upon which to place it. The opinion of the court speaks for itself.

This court has already held that in a proceeding by information in the nature of *quo warranto,* a super-

sedeas will be granted. In the case of *United States vs. Addison*, 22 *Howard*, the circuit court rendered a judgment of ouster against the defendant and he sued out a writ of error, which operated as a supersedeas to the judgment. The defendant in error, alleging that the court had no jurisdiction of the writ of error, applied for a mandamus commanding the circuit court to issue process for the execution of the judgment. It was contended in the case that a writ of error would not lie to review the decision in the proceeding in the nature of *quo warranto* and that the remedy was inappropriate and ineffectual for the same reasons as contended for by appellee here. As to this the court said:

"But it is said that the remedy by writ of error is inappropriate and ineffectual, as the office of the relator will expire about the time the writ of error is made returnable. This may be a defect in the law, which the legislative power only can remove. A writ of error returnable *instanter* would give more speedy relief, and might be more satisfactory, but we must administer the law as we find it.

"The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute with effect his writ of error.

"We can entertain no doubt that the writ of error is the legal mode of revising the judgment of the circuit court in this case; and that security having been given on the judgment, as the law requires, it is superseded."

United States vs. Addison, 22 *How.* 174.

This court thus clearly recognized the right to

have a review of the judgment of the court below in *quo warranto* cases although the cause might not be heard and determined in the appellate court before the final expiration of the term of office. In this case as there a supersedeas was given when the appeal was taken, and a previous supersedeas had been given when the writ of error was sued out in the supreme court of the territory. In fact an appeal to the supreme court of the territory is only one step towards reaching this court. The supersedeas bond on this appeal will be found in the *record at pages 25 to 27, inclusive.*

One of the motions passed upon by the supreme court of the territory, as already pointed out, was a motion to quash the supersedeas, which could only be granted under the laws of the territory upon the giving of a bond, which was given, in order to secure a supersedeas pending the hearing in the supreme court of the territory. So that the two cases are exactly alike in this respect, the cause was on its way to the Supreme Court of the United States from the time the writ of error was sued out and the bond given in the district court, before the expiration of the term of office, the writ of error having been sued out from the district court immediately following the judgment in the district court on the 19th day of November, 1904. The record shows that the assignment of error was filed in the supreme court of the territory on the 23rd day of December, 1904. (*See Trans. p. 21 folio 34*). So that the case was pending in that court upon the supersedeas bond given in the district court before the expiration of the term of office. These two bonds are evidently to be treated as one.

In the case above cited, *U. S. vs. Addison*, 22 *How., supra.*, a suit was afterwards brought upon the

bond, and this court said:

"By the judgment of ouster against Addison, his right to the office of mayor was determined..... By the writ of error and the suspension bond the enforcement of the judgment was prevented, and until the writ was dismissed the relator was excluded from the office and deprived of the salary connected with it. The amount of the salary received by the defendant Addison, during the period of such deprivation, constitutes, under the decision in the mandamus case, (22 *How., supra.*) the measure of the damage which the plaintiff is entitled to recover upon the suspension bond."

United States vs. Addison, 2 *Wall.* 291-297.

The force and effect of the two cases last above cited has never in any way been modified by any decision of this court.

III.

The fees and emoluments for assessors in the Territory of New Mexico are fixed by statute, as follows:

"The assessors shall be paid four per cent of all taxes and licenses collected under their assessments in their respective counties, which per cent shall be payable to said assessors by the treasurer to whom said taxes and licenses are by law payable, out of any of such taxes and licenses so paid in to such treasurers, and said per cent. shall be due and payable to said assessors by said treasurers respectively, upon order of the board of county commissioners immediately upon receipt by such treasurers of sufficient funds for that purpose from said taxes and licenses."

Compiled Laws of N. M., of 1897, *Sec.* 1794.

So that the appellant in this case, having been the actual incumbent of the office of assessor of the County of Bernalillo from the date of his appointment in March, 1903, unquestionably until the date of his ouster under the judgment rendered by the district court in November, 1904, all fees and emoluments collected by him after the giving of the supersedeas bond in the district court are in question in this case, and if the case was dismissed he and his boudsmen would be liable for all said fees and emoluments. As the fees are payable out of taxes when collected, they could and did amount to several thousand dollars. Undoubtedly, within the rule laid down in 6 *Wall., supra.*, he would be liable for all fees and emoluments received by him during the period of deprivation of office by reason of the giving of said supersedeas bonds. See,

U. S. vs. Addison, 22 *How., and* 6 *Wall., supra.*

It certainly could not be said that this does not furnish a reason why this appeal should be heard, and as the court below contends in its opinion, that this case should be heard on appeal in order to finally settle the rights of the relator to recover such fees. The presumption certainly is that the actual incumbent of the office received them.

IV.

Again; to enforce the doctrine contended for by the appellee in this case and dismiss this appeal would be in effect to deprive the claimants of office from ever having a review of their cases under the statute which gives them such review. The time that the appellant was appointed to his office, in March, 1903, to the first of January, 1905, was not sufficient for this

cause to have been tried and heard in the district and supreme courts of the Territory and reach this court for review; and would deprive him of the right of appeal given him by the statute, unless this court holds as it did in *United States vs. Addison*, 22 *How., supra.*, when it said:

"But it is said that the remedy by writ of error is inappropriate and ineffectual, as the office of the relator will expire about the time the writ of error is made returnable. This may be a defect in the law, which the legislative power only can remove. A writ or error returnable *instanter* would give more speedy relief, and might be more satisfactory, but we must administer the law as we find it.

"The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute with effect his writ of error.

"We can entertain no doubt that the writ of error is the legal mode of revising the judgment of the circuit court in this case; and that security having been given on the judgment, as the law requires, it is superseded."

United States vs. Addison, 22 *How., supra.*

V.

We are aware that this court in the case of *Tennessee vs. Condon*, 189 United States, dismissed an appeal from the supreme court of Tennessee, involving the title to offices in that state. The suit, however, was brought in equity under the statutes of the state of Tennessee and was not a suit in the nature of *quo war-*

ranto, brought in the name of the state, for the purpose of determining title to office. It was instituted at the instance of persons superseded in public office by an act of the general assembly. The court says:

"In the circumstances this case assumed the aspect of a civil contest between individuals, and not of a prerogative writ to correct ursurpation of office."

Tennessee vs. Condon, 189 *U. S.* 68.

The suit was brought by the Attorney General and in the name of the Attorney General, and it does not detract from the fact that it was a public proceeding although it was brought at the instance of a private relator claiming the office. In the opinion in this case, it is said:

"There are cases in *quo warranto* in which judgment of ouster has been entered although the term of the person lawfully entitled had expired, and also where informations had been retained, when the statute provided for fine or damages, but here the proceedings can not be maintained as on behalf of the public, and considered, as counsel insists it should be, as merely a contest between two sets of officials and not between the state and its officials, the state courts would be at liberty to treat it as abated, and the mere matter of costs cannot be availed of to sustain jurisdiction. See *Poring vs. Griffith*, 1 Heiskell, 456, 461; *State vs. McConnell*, 3 Lea 332; *Williamson County v. Perkins*, 39 S. W. Rep. 347; *State v. Lindsey*, 103 Tennessee, 625, 635."

Tennesse vs. Condon, 189 *U. S.* 70.

It is not a mere question of fine or damage which may be recovered under the act of 9th Anne in the case

at bar but the Tennessee case was clearly merely a contest between two sets of officials and not between the state and its officials, and the state court will be at liberty to treat it as abated, and as stated here, the mere matter of costs cannot be availed of to sustain jurisdiction. The opinion quotes decisions of the State of Tennessee holding to this effect.

Besides the only question before the court in this case was a federal question, as to whether the act of the legislature was in conflict with the XIVth Amendment and as the court says, its decree would clearly be ineffectual for any purpose whatever as the state court would not be bound to render any judgment different from the judgment already rendered.

And our contention does not in any way detract from the case of *Mills vs. Green*, cited in the opinion, that this court should not decide the case, "that when, pending an appeal from the judgment of the lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal" Citing *Mills vs. Green*, 159 U. S. 651, 653.

Id., page 71.

We insist that this case, upon the reasoning of the court below the authorities there cited, is not brought within that principle and that the appellant, if the decision should be in his favor, would secure from this court effectual relief,—relief from accounting for the fees and emoluments of the office received by him while he was the actual incumbent, if he is shown to have been the lawful incumbent thereof, and also, from the possible imposition of a fine, if the case should be

reversed.

VI.

Among the cases cited by the court below in its opinion, we expressly call attention to the following:

People upon the relation of Swan vs. Loomis, 8 *Wend.* 396.

People vs. Hartwell, 12 *Mich.* 508.

Hunter vs. Chandler, 45 *Mo.* 452.

State vs. Pearce, 35 *Wis.* 93.

Commonwealth vs. Jackson, 45 *Pa. St.* 49.

People vs. Rogers, 118 *Calif.* 394.

Dean vs. State, 56 *Nber.* 302.

Hammer vs. State, 44 *N. J. L.* 671.

Also, *Commonwealth vs. Smith,* 45 *Pa. St.* 60.

In the latter case, it is said:

"I have no doubt that *quo warranto* brought within the term of an office, may be well tried after the term has expired."

As the court below points out, a number of these decision are from states which, like New Mexico, have no staututory provision as to *quo warranto,* and are thus squarely in point. We add that an examination of the authorities from other states will show that the statutes are merely declaratory of the provisions of the statute of 9th Anne, which, as the court undoubtedly correctly holds, is a part of the common law in New Mexico.

We can add nothing to what the court below said in regard to the effect of this decision on the right to recover the emoluments of office.

See Transcript, page 59, *folio* 71.

And the review of the decision *contra,* and some of

them seemingly against the conclusions of the court, is so full and satisfactory that we shall not attempt to add anything to it.

See Transcript, folios 72-73.

State vs. Porter, 58 *Iowa* 19; 11 *N. W.* 715. Is a case which holds:

"The relator asks that he be adjudged and decreed to be the lawful subdirector, and that the defendant be ousted and excluded from office. The term of the office having expired, the court could not grant this relief. No fees attach to the office of subdirector, and hence neither party had anything to gain or lose by further litigation. Courts are not organized for the purpose of determining mere abstractions."

In *People vs. Seaman,* 5 *Denio* 409, it was expressly held:

"The year for which this election was made has passed, and there can be no judgment of ouster, and the relator cannot be put into office, but he is still entitled to judgment and to his costs. People vs. Loomis, 8 Wend. 396.

"Judgment for plaintiff."

VII.

We submit that the position of the appellee that the judgment was self-executing and no appeal or supersedeas would lie therefrom, is not sustained by authority. Neither the case of *Foster vs. Kansas,* 112 United States, nor *Wilson vs. North Carolina,* 169 United States, were intended to overrule the proposition laid down in the case of *United Staets vs. Addison,* 22 How. and 6 Wall., *supra. Foster vs. Kansas* only determined whether the writ of error could oper-

ate as a supersedeas. An examination of *Wilson vs. North Carolina* shows conclusively that neither of these cases apply to the case at bar. The last case also shows what this court held to be the effect of giving the bond in *United States vs. Addison*, 22 How. *supra*, that immediately upon the giving of proper bond, further proceedings were stayed in the court below. They say:

"It was not a case where immediately upon the entering of the judgment of ouster the court had directed the possession of the office to be taken by the relator, who had taken possession accordingly. The court was asked to actively intervene to put the relator in possession of the office, notwithstanding the allowance of a writ of error and the filing of a bond. The court refused to do so, holding that the supersedeas bond stayed further proceedings under the judgment."

Wilson vs. North Carolina, 169 *U. S.* 598.

That is exactly our contention here.

An examination of the case of *Kimball vs. Kimball*, 174 U. S., shows that it has no application. It holds that the petitioner could not be appointed administratrix and that the letters of other persons had already been revoked and however the abstract question as to her right to have been appointed at the time she first made application may have been decided, it could have no effect whatever upon her rights by virtue of the decision which the court might render. So far as the federal question involved in that case, that is whether a court which granted a divorce had jurisdiction and whether full faith and credit had been given to the acts of the court granting the divorce in Dakota, was concerned, the question as to who was entitled to letters of administration on the estate of the deceased

was a mere moot question; and it appearing that this was true, the court correctly held that it would not take jurisdiction merely to determine that abstract question, upon which no relief could be had in the court below.

VIII.

This case is appealable to this court because it involves the validity of an authority exercised under the laws of the United States, namely, the power of the legislature of New Mexico to enact certain legislation.

See *Clayton vs. Utah*, 132 *United States*, 632.

IX.

The supreme court of the territory having refused to dismiss the appeal, the appellee here is not in a situation to complain of that error. The motion to dismiss in this case is equivalent to an assignment of errors on the part of the supreme court of New Mexico.

A party who does not take a writ of error or appeal cannot be heard to complain of an adverse ruling in the court below.

Bolles vs. Outing Co. 175 *U. S.* 262, and cases there cited.

American Ins. Co. vs. Canter, 3 *Peters* 318.

Chittenden vs. Brewster, 2 *Wall.* 191.

Clark vs. Killian, 103 *U. S.* 766.

Loudon vs. Taxing District, 104 *U. S.* 771.

Cherokee Nation vs. Blackfeather, 155 *U. S.* 218.

Respectfully submitted,

W. B. CHILDERS,

Attorney for Appellant.

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Clerk.

Supreme Court of the United States

OCTOBER TERM, 1905

No. 229

GEORGE F. ALBRIGHT, APPELLANT,

vs.

THE TERRITORY OF NEW MEXICO, *EX REL.*,
JESUS M. SANDOVAL, APPELLEE.

APPEAL FROM THE SUPREME COURT OF
THE TERRITORY OF NEW MEXICO.

Motion to Dismiss and Brief of Appellee Thereon

NEILL B. FIELD,
Counsel for Appellee.

Supreme Court of the United States

OCTOBER TERM, 1905

No. 229

GEORGE F. ALBRIGHT, APPELLANT,

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THE TERRITORY OF NEW MEXICO *EX REL.*,
JESUS M. SANDOVAL, APPELLEE.

APPEAL FROM THE SUPREME COURT OF
THE TERRITORY OF NEW MEXICO.

MOTION TO DISMISS

Comes now the appellee, by Neill B. Field, his attorney, and moves the court to dismiss the appeal in the

damages, however flagrant may have been his usurpation. The possibilities of this result are more than remote when it is recalled that many terms of office are only one or two years in duration, and that in the ordinary administration of justice, it often takes fully that length of time to secure from the court of final resort a decision upon the merits of the controversy. We do not believe it to be the law that a litigant can thus speculate upon the chances of a trial of his case and by delaying the hearing of the cause a sufficient length of time to accomplish the result which could never be obtained by a trial upon the merits.'

(*Transcript p.* 59).

But I submit that the language of this court, in the case of *Kimball v. Kimball,* 174 *U. S.* 163, is a complete answer to that position:

> "The question whether the petitioner was or was not the widow of the deceased, whatever importance it may have in the determination of other controversies in which she may be interested, is a moot question in this case in the present condition of things; for, however that question should be decided, the petitioner cannot obtain letters of administration, and the letters of administration granted to other persons have been revoked."

There being nothing upon which the judgment of this court can operate, the appeal must, in accordance with the established practice of this court, be dismissed.

California v. San Pablo R. R., 149 *U. S.* 314.
Mills v. Green, 159 *U. S.* 651.

Respectfully submitted,
NEILL B. FIELD,
Counsel for Appellee.

To George F. Albright, appellant in the above entitled cause, and to W. B. Childers, his attorney:

You are hereby notified that the undersigned will on Monday, the 27th day of November, 1905, move the Honorable Supreme Court of the United States to dismiss the appeal in the above-entitled cause, for the reason stated in the foregoing motion and argument, which will be submitted for the consideration of the court.

NEILL B. FIELD,
Attorney for Appellee.

Service of the foregoing notice was accepted at Albuquerque, New Mexico, this 24th day of October, 1905.

W. B. CHILDERS,
Attorney for Appellant.

Supreme Court of the United States.

No. 229.—October Term, 1905.

George F. Albright, Appellant,
vs.
The Territory of New Mexico ex rel Jesus M. Sandoval.

Appeal from the Supreme Court of the Territory of New Mexico.

[January 2, 1906.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a proceeding in *quo warranto* brought in the District Court of Bernalillo County, New Mexico, July 20, 1903, by the Territory on the relation of Jesus M. Sandoval against George F. Albright, it being alleged that Sandoval was duly elected to the office of assessor of Bernalillo County for the term of two years from the first day of January, 1903; that he duly qualified and entered on the discharge of the duties of the office; and that he had never resigned, vacated or abandoned the office, and ever since his election and qualification had continued to discharge the duties thereof. It was further alleged that on March 23, 1903, respondent Albright, without authority of law, unlawfully usurped the office and took possession of the assessor's room in the court house and of the books, papers and other insignia of office, claiming office by virtue of a pretended appointment by the board of county commissioners of Bernalillo County, made under the authority of an act of the legislative assembly of the Territory of New Mexico, entitled "An act to create the county of Sandoval," approved March 10, 1903, as amended by an act entitled "An act to amend section 3 of an act entitled 'An act to create the county of Sandoval,'" approved March 12, 1903.

Judgment was rendered by the District Court in favor of Albright, August 3, 1903, and carried to the Supreme Court of the Territory, which reversed the judgment and remanded the cause with directions to the court below to reinstate it and proceed in accordance with the views expressed in its opinion. 78 Pac. Rep. 204. The mandate was filed below October 19, 1904, and on the 19th of November the District Court entered judgment "that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of assessor of the county of Bernalillo and Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner

intermeddling with, or attempting to perform the duties, or exercise the functions of the office of assessor of the county of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico as the lawful custodian thereof," and for costs.

The case was again carried to the Supreme Court and heard upon a motion to dismiss, and on the merits, and February 24, 1904, the court denied the motion to dismiss, modified the judgment of the District Court by striking out the words "and that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico, as the lawful custodian thereof," and affirmed the judgment as so modified. 79 Pac. Rep. 719. On the same day an appeal was allowed to this court, a supersedeas bond given, which was approved March 9, 1905, and the record was filed here April 17. The case comes before us on a motion to dismiss.

The ground assigned for the motion is the expiration of the term of the office of assessor of the county of Bernalillo and the consequent lack of power to grant appellant any effectual relief. But the same motion has already been considered and denied by the Supreme Court of the Territory, and its renewal here amounts to no more than an assignment of error to the action of that court in this regard, to be passed on and disposed of as such, if otherwise we have jurisdiction of the case. If we have not, the appeal must be dismissed even though for reasons not put forward in support of the motion. The opinion of the Supreme Court fully discussed the authorities on the subject of the right to have a review of the judgment on appeal after the expiration of the term of office involved in the proceeding in *quo warranto*. The court refused to dismiss the writ, holding that the statute, 9 Anne, c. 20, § 5, providing that in addition to judgment of ouster, fine and costs may be imposed, was a part of the common law of the Territory, and also that the judgment might affect the rights of the parties in another litigation in relation to the emoluments of the office.

The appeal to this court was taken under the statute of March 3, 1885, 23 Stat. 443, c. 355; *Shute* v. *Keyser*, 149 U. S. 649. Both sections of that act apply to cases where there is a matter in dispute measurable by some sum or value in money, although the amount is not restricted under the second section. *Washington & Georgetown Railroad Company* v. *District of Columbia*, 146 U. S. 227; *Farnsworth* v. *Montana*, 129 U. S. 104. In proceedings in *quo warranto*, such as those in this case, the alleged usurpation is the matter in dispute and the liability to a fine on judgment of ouster does not make that matter measurable by some sum or value in

money. As in criminal cases, the fine is "in the eye of the law, a punishment for the offense committed, and not the particular object of the suit." *United States* v. *More*, 3 Cranch, 159, 174. Moreover, appellant could hardly be allowed to invoke our jurisdiction on the ground that if his appeal were sustained he might be fined on a new judgment.

The term of office had expired before the rendition of judgment by the Territorial Supreme Court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even though the judgment might be conclusive in such subsequent action. *New England Mortgage Security Company* v. *Gay*, 145 U. S. 123; *Washington & Georgetown Railroad Company* v. *District of Columbia*, 146 U. S. 227.

Appeal dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.

above entitled cause for the following reason, to-wit: because the term of the office of assessor of the county of Bernalillo, in the Territory of New Mexico, expired on the 1st day of January, 1905, and it is not within the power of the court to grant the appellant any effectual relief in this case.

NEILL B. FIELD,
Attorney for Appellee.

BRIEF ON ABOVE MOTION

STATEMENT OF THE CASE

This was a proceeding by *quo warranto* to try the title of the appellant, George F. Albright, to the office of assessor of Bernalillo county, New Mexico, for a term which, as shown by the record, expired January 1st, 1905. (*Transcript p.* 3, *folio* 6). The district court of Bernalillo county, in the first instance, sustained the title of appellant; but, on appeal, that judgment was reversed. The case was remanded to the district court, where an amended answer was filed by appellant; and, on the 19th day of November, 1904, judgment of ouster was rendered by the district court, (*Transcript p.* 20, *folio* 32). The case was taken on error to the supreme court of New Mexico, where, on January 10th, 1905, it was argued on a motion to dismiss or affirm, (*Transcript p.* 22, *folio* 35). On Feb-

ruary 24th, 1905, the supreme court modified the judgment of the court below, and affirmed it, and, on the same day, allowed an appeal to this court, and on the following day allowed a supersedeas, fixing the amount of the bond in the sum of fifteen thousand dollars, (*Transcript pp.* 23, 24, 25). In the opinion filed, on the last appeal, the court discussed at great length the right to review the judgment of the court below after the expiration of the term of office, and held that such right to review existed, notwithstanding the expiration of the term. This conclusion seems to be based upon two propositions:

First. That by the statute of 9th Anne, which is said to be a part of the common law of New Mexico, a court, in a proceeding by *quo warranto,* has power to inflict a fine against one who usurps an office or franchise; and,

Second. That the judgment in this case may affect the rights of the parties in another litigation.

If the trial court had inflicted a fine against appellant, there would be force in the suggestion that he could prosecute an appeal to be released from it, but it is not perceived that he can have a right to prosecute an appeal in order to give the trial court an opportunity to fine him on another trial. It is probably true that the judgment in this case will affect his rights in another litigation, but that is not sufficient to require this court to review the case.

Counsel for appellee submits the following in support of the motion to dismiss:

I.

THE TERM OF THE OFFICE WHICH WAS IN CONTROVERSY HAVING EXPIRED, THERE IS NOTHING UPON WHICH A JUDGMENT CAN OPERATE, AND THIS COURT CAN GIVE THE PLAINTIFF IN ERROR NO EFFECTUAL RELIEF.

The sole purpose of this proceeding was to determine the title of appellant to the office of assessor of Bernalillo county, for the term which expired January 1st, 1905. It is true that the district court attempted to adjudicate the title of the relator, Sandoval, also, but the supreme court of New Mexico modified the judgment of the district court, and struck out so much of it as passed upon the relator's right, eliminating the following words from the judgment of the district court:

> "And that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico, as the lawful custodian thereof."
>
> (*Transcript p.* 23).

When this was done, the term of office had expired, and it was impossible for the supreme court of New Mexico to make its action effective. The judgment of the district court, rendered on the 19th day of Novem-

ber, 1904, (*Transcript pp.* 20, 21), in so far as it was a judgment of ouster, at least, was self-executing.

Foster v. Kansas, 112 *U. S.* 201.
Wilson v. North Carolina, 169 *U. S.* 598.

Its effect was to remove appellant and leave the office vacant; it needed no execution to carry it into effect. The reversal of the judgment, after the expiration of the term, could not put the appellant back into office, nor could it be made effectual in any manner. That the supreme court of New Mexico entertained the view that a judgment in this case might be made the basis of a suit for the emoluments of the office, and, therefore, the right to review after the expiration of the term necessarily existed, is manifest from its opinion:

> ". . . . How far the judgment in this proceeding is, independent of the statute such as exists in California and Wisconsin, available as a basis for an action for the emoluments of the office involved, we need not now determine. We note, however, that the defendant in error contends that 'the judgment of the district court will affect the rights of the parties in another litigation with reference to the emoluments of the office.' If his position as to this be correct, then his motion is met by all of the cases above cited, which hold that when the effect of the judgment is to establish the basis of a suit to recover emoluments, the action continues. Otherwise it would be within the power of the usurper of an office, by resignation pending the suit, to evade all liability; or by dilatory tactics and by availing himself of the law's delays to prolong the duration of almost every suit of this kind beyond the term of office involved and thus to come free of costs, fine or